APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5139

GENE HAM,

Petitioner,

v.

SOUTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI FILED 7/24/71

CERTIORARI GRANTED 1/24/72

	Page
Relevant Docket Entries	iv
Statement of the Case	1
Arrest Warrants	3
Indictment	3
Transcript of Hearing on Motion to Strike Jury Venire	3
Testimony	
Defendant's Witnesses:	
Mrs. Vivian Whitlock—	
Direct	17
L. R. Waddell—	
Direct	19
Mrs. Vivian Whitlock (Recalled)—	
Direct	24
L. R. Waddell (Recalled)—	
Direct	27
James C. Gregg—	
Direct	28
Selection of Jury	36
Transcript of Trial on Merits	48
Testimony	
State's Witnesses:	
Gene Lessmeister—	
Direct	48
Cross	51
Reed Long—	
Direct	53
Cross	55
Redirect	57
James K. Wilson—	
Direct	58
Cross	61
Defense Witnesses:	
Gene Ham—	
Direct	71
Cross	77
Redirect	83
Reply Testimony:	
Gene Lessmeister—	
Direct	86
Cross	87
Charge of Judge Baker	88
Exceptions	94
Opinion of Supreme Court of South Carolina	100

	Page
Order Denying Petition for Rehearing	106
Order Staying Execution of Sentence	107
Order of Supreme Court of United States Granting Motion for Leave to Proceed In Forma Pauperis and Granting Petition for Certiorari	108
Statement of the Case	1-2
Arrest Warrants (5)	3-7
Indictment #1958	8
Transcript of Trial Proceedings	8-94
Exceptions	94-99
Agreement of Counsel	99-108

Relevant Docket Entries

Court of General Sessions for Florence County, South Carolina

The State

v.

Gene Ham

June 1, 1970	Indictment returned by Grand Jury
June 8, 1970	Jury drawn and sworn Witnesses sworn to testify
	Verdict: Guilty
	Sentence: Eighteen months

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM FLORENCE COUNTY

HONORABLE G. BADGER BAKER, JUDGE

THE STATE,

Respondent,

AGAINST

GENE HAM,

Appellant.

TRANSCRIPT OF RECORD

MORDECAI C. JOHNSON
Florence, South Carolina

FRANK E. CAIN, JR.
Bennettsville, South Carolina

JOHN A. GAINES
Rock Hill, South Carolina

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Florence, South Carolina

ASSISTANT ATTORNEY GENERAL TIMOTHY G. QUINN
Columbia, South Carolina

STATEMENT OF THE CASE

The appellant, Gene Ham, Was arrested on May 15, 1970 in the city of Florence on the basis of four arrest warrants charging him with possession and sale of various

stimulant drugs. Following his arrest the appellant was carried to the city jail where the arresting officers conducted a search of his person which revealed a quantity of an unidentified substance. Thereafter the appellant was lodged in jail and a fifth arrest warrant was issued which charged him with possession of "certain stimulant drugs to wit, Marijuana." Five days later appellant was released on bail pending trial of the matters alleged in the warrants.

On May 28th and 29th a preliminary hearing in these matters was conducted before the Honorable Thomas E. Rogers, Jr., a Magistrate for Florence County at the County Courthouse; and he found probable cause to bind the defendant over to General Sessions Court.

On June 1st, the Grand Jury returned true bills on all of the indictments charging possession of various stimulant drugs; and on June 2nd, the State proceeded to trial on indictment No, 1958 which charged the appellant with illegal possession of depressants or stimulants (Marijuana). The trial was held in the Court of General Sessions for Florence County before Honorable G. Badger Baker and a jury. At the conclusion of the evidence the matter was submitted to the jury which returned a verdict of guilty. Thereafter, counsel for defendant presented a motion for judgment notwithstanding the verdict or in the alternative a new trial which was denied by the Court. Whereupon Judge Baker passed the following sentence:

> ". . . (T)he Sentence of the Court is that you be confined upon the public works of this county or in the State Penitentiary for a period of eighteen (18) months." (Tr. p. 133)

After sentence was passed the Court set bond at $1500 pending appeal of the conviction and sentence. Thereafter, written notice of appeal was duly served upon the Solicitor of the Twelfth Judicial Circuit on June 12, 1970; and it is from the sentence of Judge Baker that the defendant makes this appeal.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

BY Thomas E. Rogers, Jr. A MAGISTRATE in and for said County and the said State, To ANY LAWFUL CONSTABLE:

WHEREAS, Complaint upon oath has been made by E. J. Lessmeister that in Florence County, in the State aforesaid on or about the 15 day of May, 1970, One Gene Ham did violate the Code of Laws of S.C. in that he did have in his possession certain stimulant drugs, to-wit, marijuana, all of which is against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

THESE ARE THEREFORE to command you to apprehend the said Defendant, Gene Ham and bring him before me to be dealt with according to law.

GIVEN under my hand and seal, this 15 day of May one thousand nine hundred and 70.

THOMAS E. ROGERS, JR. (L.S.)
Magistrate

AFFIDAVIT

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

PERSONALLY appeared before me Carolyn H. Smith a Notary Public of said County and the said State, E. J. Lessmeister who, being duly sworn, says that in the County and State aforesaid, on or about the 15 day of May 1970, One Gene Ham did have in his possession a quantity of stimulant drugs, to-wit, marijuana.

SWORN to before me this 15 day of May, 1970.

(Carolyn H. Smith)
(L.S.)
Magistrate
(E. J. Lessmeister)

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

BY Thomas E. Rogers, Jr. A MAGISTRATE in and for said County and the said State, TO ANY LAWFUL CONSTABLE:

WHEREAS, Complaint upon oath has been made by E. J. Lessmeister that in Florence County, in the State aforesaid, on or about the 27 day of April, 1970, One Gene Ham did violate the Code of Laws of S.C. in that he did sell and have in his possession certain stimulant drugs, to-wit, Dexamyl #2, and did sell the same to Mike Martin, all of which is against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

THESE ARE THEREFORE to command you to apprehend the said Defendant, Gene Ham and bring him before me to be dealt with according to law.

GIVEN under my hand and seal, this 13 day of May one thousand nine hundred and 70.

THOMAS E. ROGERS, JR. (L.S.)
Magistrate

AFFIDAVIT

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

PERSONALLY appeared before me Carolyn H. Smith a Notary Public of said County and the said State, E. J. Lessmeister who, being duly sworn, says that in the County and State aforesaid, on or about the 27 day of April 1970, One Gene Ham did have in his possession certain stimulant drugs, to-wit: Dexamyl #2, and did sell the same to one Mike Martin.

SWORN to before me this 13 day of May, 1970.

CAROLYN H. SMITH (L.S.)
Magistrate

E. J. LESSMEISTER

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

BY Thomas E. Rogers, JR. A MAGISTRATE in and for said County and the said State, To ANY LAWFUL CONSTABLE:

WHEREAS, Complaint upon oath has been made by E. J. Lessmeister that in Florence County, in the State aforesaid, on or about the 14 day of May, 1970, One Gene Ham did violate The Code of Laws of S.C. in that he did have in his possession a quantity of stimulant drugs, to-wit: Librium, 5 mg., all of which is against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

THESE ARE THEREFORE to command you to apprehend the said Defendant, Gene Ham and bring him before me to be dealt with according to law.

GIVEN under my hand and seal, this 14 day of May one thousand nine hundred and 70.

THOMAS E. ROGERS, JR. (L.S.)
Magistrate

AFFIDAVIT

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

PERSONALLY appeared before me Carolyn H. Smith a Notary Public of said County and the said State, E. J. Lessmeister who, being duly sworn, says that in the County and State afosesaid, on or about the 14 day of May 1970, One Gene Ham did have in his possession a quantity of stimulant drugs, to-wit, Librium, 5 mg.

SWORN to before me this 14 day of May, 1970.

CAROLYN H. SMITH (L.S.)
Magistrate

E. J. LESSMEISTER

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

BY Thomas E. Rogers, Jr. A MAGISTRATE in and for said County and the said State, To ANY LAWFUL CONSTABLE:

WHEREAS, Complaint upon oath has been made by E. J. Lessmeister that in Florence County, in the State aforesaid, on or about the 19 day of April, 1970, One Gene Ham did violate the Code of Laws of S.C. in that he did sell and have in his possession certain stimulant drugs, to-wit, Dexamyl #1, and did sell the same to Mike Martin, all of which is against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

THESE ARE THEREFORE to command you to apprehend the said Defendant, Gene Ham and bring him before me to be dealt with according to law.

GIVEN under my hand and seal, this 13 day of May one thousand nine hundred and 70.

THOMAS E. ROGERS, JR. (L.S.)
Magistrate

AFFIDAVIT

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

PERSONALLY appeared before me Carolyn H. Smith a Notary Public of said County and the said State, E. J. Lessmeister who, being duly sworn, says that in the County and State aforesaid, on or about the 1 day of April 1970, One Gene Ham did have in his possession certain stimulant drugs, to-wit: Dexamyl #1, and did sell the same to one Mike Martin.

SWORN to before me this 13 day of May, 1970.

CAROLYN H. SMITH (L.S.)
Magistrate

E. J. LESSMEISTER

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

BY Thomas E. Rogers, Jr. A MAGISTRATE in and for said County and the said State, TO ANY LAWFUL CONSTABLE:

WHEREAS, Complaint upon oath has been made by E. J. Lessmeister that in Florence County, in the State aforesaid, on or about the 30 day of April, 1970, One Gene Ham did violate the Code of Laws of S.C. in that he did sell and have in his possession certain stimulant drugs, to-wit, Bithetamine #20, and did sell the same to Mike Martin, all of which is against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

THESE ARE THEREFORE to command you to apprehend the said Defendant, Gene Ham and bring him before me to be dealt with according to law.

GIVEN under my hand and seal, this 13 day of May one thousand nine hundred and 70.

THOMAS E. ROGERS, JR. (L.S.)
Magistrate

AFFIDAVIT

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

PERSONALLY appeared before me Carolyn H. Smith a Notary Public of said County and the said State, E. J. Lessmeister who, being duly sworn, says that in the County and State aforesaid, on or about the 30 day of April 1970, One Gene Ham did have in his possession certain stimulant drugs, to-wit: Bithetamine #20, and did sell the same to one Mike Martin.

SWORN to before me this 13 day of May, 1970.

CAROLYN H. SMITH (L.S.)
Magistrate

E. J. LESSMEISTER

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

ILLEGAL POSSESSION OF DEPRESSANTS OR STIMULANTS

At a Court of General Sessions, begun and holden in and for the County of Florence in the State of South Carolina, at Florence County Court House, in the County and State aforesaid, on the First Monday of June in the year of our Lord, one thousand nine hundred and seventy.

The Jurors of and for the County aforesaid, in the State aforesaid, upon their oath, Present:

That Gene Ham late of the County and State aforesaid, on the 15th Day of May in the year of our Lord one thousand nine hundred and seventy with force and arms, at Florence County Courthouse in the County and State of South Carolina did violate Section 32-1506, paragraph 2d, of the 1962 Code of Laws for the State of South Carolina, as amended, in that he did possess a quantity of drugs, without medical prescription and without being prescribed or administered by medical prescription or authority, said drugs designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect, namely, marijuana.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

COURT OF GENERAL SESSIONS

THE STATE
vs.
GENE HAM,
Defendant.

TRANSCRIPT

SOLICITOR: May it please the Court, in case No. 1956, The State v. Gene Ham, indictment for illegal possession of depressants and stimulants, I have just been informed by counsel who represented the defendant that they have withdrawn from the case.

THE COURT: Very well. Commit the defendant to jail and we will carry it over until he gets counsel. What's the reason for withdrawing?

MR. JOHNSON: Your Honor, the fee arrangement hasn't been—he hasn't been able to meet the fee arrangement. That is why we ask to be withdrawn.

THE COURT: What?

MR. JOHNSON: That's the reason we ask to be withdrawn because the defendant has been unable to complete the fee arrangement, and it does not appear to my mind that he is an indigent. He hasn't been able to—we arranged for him to be out of jail since his arrest, and we have gone forward although he has not completed the fee, we have gone forward to—(interruption)

THE COURT: When was he arrested?

MR. JOHNSON: On May Fifteenth.

THE COURT: Is he employed?

MR. JOHNSON: No, sir. We went forward with a bond hearing and we went forward with the preliminary hearing with the expectation that some fee arrangement would be completed, and it hasn't been completed to date.

THE COURT: Did he gave you any assurance of paying a fee?

MR. JOHNSON: Well, he gave me assurance at the time that I entered into the case, but it was contingent on his being able to raise it.

THE COURT: Did you enter into the case on a basis that you would be paid?

MR. JOHNSON: He said he would, yes, sir.

THE COURT: And you are now coming in and saying you will not defend him as an indigent defendant?

MR. JOHNSON: No, sir. I would be willing, if the Court please, to serve on an appointed basis, if that's the Court's pleasure. Mr. Cain and I have both talked about it. We would serve on an appointed basis.

THE COURT: Well, you just now said you were withdrawing.

MR. JOHNSON: Well, I'll try to clarify it. What I'm saying is that we are willing—I have put some work in the case, Mr. Cain and I both have, and we are willing to serve on an appointment basis if the Court finds that he is indigent, and if the ends of justice will be benefitted if we should be appointed. But we are not able to continue

in the case on a non-fee basis. As you understand under the appointment statute there is a provision for payment by the State.

THE COURT: I think I know that better than you know it. I am just trying to ascertain what you are attempting to do.

MR. JOHNSON: Well, I am attempting to withdraw from the case.

THE COURT: Well, why didn't you petition the Court as you were supposed to? You wait here until the trial comes up and announce you are withdrawing. Why didn't you do that beforehand? Are you acquainted with trial procedure.

MR. JOHNSON: Well, we are—this Court—the indictment was just handed down yesterday, your Honor.

THE COURT: Then why didn't you petition yesterday?

MR. JOHNSON: We were under the hope that the fee arrangement could be completed by today and it hasn't been, and we have gone forward in the case. Actually, we have gone over-forward in the case. We haven't even been able to pay the stenographer for taking the preliminary testimony. We have actually gone over-forward and have bent over backwards to make sure he was represented to the extent that we could.

THE COURT: All right, now what?

MR. JOHNSON: Well, we are requesting to be permitted to withdraw, unless the Court sees fit, as I said, to appoint us, in which case we are willing, but I am not asking for that.

THE COURT: What it The State's position on it?

SOLICITOR: The State is ready to go to trial, your Honor.

THE COURT: Are you ready to go to trial?

MR. JOHNSON: No, sir, we haven't—if the Court orders us to represent him we would want to make some motions.

THE COURT: Well, I am not permitting you to withdraw.

MR. JOHNSON: Well, will we be appointed under the Statute, your Honor?

THE COURT: You are not permitted to withdraw as counsel.

MR. JOHNSON: Well, will we be appointed as counsel?

THE COURT: You are not permitted to withdraw. You will have to continue your representation.

MR. JOHNSON: Well, your Honor, it puts us in the position of providing free counsel.

THE COURT: You got yourself into that position.

MR. JOHNSON: Sir?

THE COURT: You got yourself into that position. You are not permitted to withdraw. Now, you stated you have some motions.

MR. JOHNSON: Yes, sir. Your Honor we have some motions to make that we would like to take up out of the presence of the jury.

THE COURT: What are the motions?

MR. JOHNSON: Well, we have a number of them.

THE COURT: Do you have them written out?

MR. JOHNSON: No, sir, we have not prepared them in writing.

THE COURT: State your motions.

MR. JOHNSON: Sir?

THE COURT: State your motions.

MR. JOHNSON: Well, we have a number of them, your Honor. A motion to change the venue in this case because of the amount of prejudicial publicity that has taken place with respect to drugs between the time that the defendant was arrested and the time of this trial. We have an enormous amount of publicity from—(interruption)

THE COURT: What is your motion? You know and followed the usual procedure, I guess.

MR. JOHNSON: Well, I am making the motion to the Court now.

THE COURT: You didn't do it in writing.

MR. JOHNSON: The Court won't accept an oral motion?

THE COURT: I am just asking you if you followed the procedure?

MR. JOHNSON: No, sir, we do not have it in writing.

THE COURT: All right, state your motion.

MR. JOHNSON: Our motion is the continue this case beyond the term because of the amount of prejudicial

publicity that has been involved in drug cases here recently since the time of this arrest on May Fifteenth and the time of the trial today. I have here some clippings which I would like to give to the Court showing just the kind of publicity that has taken place. I have a clipping here from The Florence Morning News of May Twenty-ninth, Nineteen Seventy, and another clipping from The Florence Morning News of May Twenty-ninth, Nineteen Seventy, on page 3-A, which refers to a recent television program, as well as an editorial from The Florence Morning News of May Twenty-ninth, Nineteen Seventy, just a few days before the trial of this case was to be called. (Clippings handed to the Court.

THE COURT: None of these refer to the defendant, or the alleged case against the defendant. I don't consider them prejudicial at all, and that motion is overruled.

MR. JOHNSON: We are also moving to continue beyond the term because counsel has not had an adequate opportunity to prepare in this case, on the grounds that the arrest took place just two weeks ago, and as your Honor knows, under the Statute a preliminary hearing has to be requested within ten days. And of course, we did request a preliminary hearing ten days before the trial, or before the term opened. And we were afforded a preliminary hearing only last Thursday and we completed it only last Friday. Because of the pressure of time the transcript of the preliminary hearing has not yet been prepared and counsel has not had an opportunity to study it and prepare the case. And so on that basis we respectfully request a continuance beyond the term in order to study the transcript—to get the transcript and study that transcript and to develop any defenses that might be available to this defendant on a basis of the testimony which is in that transcript.

THE COURT: All right, now what's your next motion. I am passing that over.

MR. JOHNSON: Your Honor, we move for a change of venue on the same grounds of the grounds of prejudicial publicity that I alluded to. I believe I moved for a continuance.

THE COURT: No, you moved for a change of venue.

MR. JOHNSON: I did? Your Honor, Mr. Cain will have a further motion to make.

MR. CAIN: May it please the Court, your Honor, at this time the defendant would have an additional motion. However, it has just come to my attention, I don't believe the Solicitor has presented the indictment and I believe this motion should come after the presentation. If it please the Court, at this time the defendant would like to move to quash the indictment on, first of all the defendant was denied the right to confer with counsel late on the night of his arrest. I understood that he was prevented from being able to have counsel talk with him at the county jail that night.

THE COURT: What time?

MR. CAIN: Approximately twelve-thirty on the night of May Fifteenth, and we feel, of course, that under the law of this State— (interruption)

THE COURT: When did counsel return to attempt to talk with his client?

MR. CAIN: I believe he returned the next morning, your Honor.

THE COURT: (speaking to Sheriff McLeod) Did he return the next morning?

SHERIFF: Not that I know of. I would not say he didn't.

THE COURT: When did he see him? He saw him the next morning?

MR. CAIN: (Conferring with Mr. Johnson) Your Honor, Mr. Johnson tells me he dosen't exactly remember. As you are aware I am just associated in this case. Mr. Johnson is chief counsel and of course, I have no personal knowledge.

THE COURT: He knows when he saw his client.

MR. CAIN: Sir?

THE COURT: He knows when he saw his client. Did you see him the next morning?

MR. CAIN: He says he doesn't remember right at the moment.

THE COURT: Did he attempt to see him the next morning?

MR. CAIN: He said he did not.

THE COURT: Very well. Did he see him the following morning?

MR. CAIN: (Conferring with Mr. Johnson) He says he doesn't recall, your Honor.

THE COURT: When does he recall seeing him, then?

MR. JOHNSON: Your Honor, I don't recall the exact time that I saw him. My recollection is that it was not the next morning. It might have been the following morning, or the morning after that. I just don't recall now. But I know that I was not permitted to see him that night.

THE COURT: You attempted to see him the next morning, or you don't remember?

MR. JOHNSON: No, sir, I don't recall. I think the Sheriff is probably correct—I did not attempt to see him the following morning. But I don't recall, you know, exactly what day it was I attempted to see him. I can say that at the time I did go back, that I did see him. There is no controversy about that.

THE COURT: Was that within twenty-four hours, or forty-eight hours?

MR. JOHNSON: I don't—I would think it was probably within the next forty-eight hours. But I didn't keep notes on it.

THE COURT: How long ago was that?

MR. JOHNSON: That was on the night of er—May Fifteenth when he was arrested the time that I tried to see him.

THE COURT: You saw him on the Seventeenth?

MR. JOHNSON: Yes, sir, I would imagine I saw him on the Seventeenth.

THE COURT: When did you get him out of jail on bond?

MR. JOHNSON: When did I get him out? If the Court will indulge me—that was on the Twentieth, according to my notes.

THE COURT: Then it would be more accurate to say you wanted to see him about one o'clock in the morning instead of around twelve o'clock, wouldn't it?

MR. JOHNSON: Well, I arrived there about twelve-

thirty, and in the course of the discussion, I imagine there was something going on until one o'clock.

THE COURT: Now what is your motion based on that?

MR. CAIN: Well, your Honor, I raised the motion and I believe that our position would be that the man was entitled to immediate counsel. There are so many things that can and do happen between the time of the arrest and detaining of a prisoner before he may have an opportunity to see counsel. And we feel that even though twelve-thirty o'clock in the morning, or twelve-thirty at night, whichever way you might interpret it, is perhaps a rather late hour, but even in spite of that fact we feel that the defendant was entitled to have his counsel immediately upon notification of counsel, and upon arrival of counsel at the jail or place of detention.

THE COURT: Well, if counsel so felt why didn't he return the next morning?

MR. CAIN: Your Honor, I think that counsel perhaps has done his best to try to answer the questions for the Court, and I will not belabor the point.

THE COURT: Well, I deny the point, then.

MR. CAIN: Yes, sir. Now, your Honor, we come now to one of the—(interruption)

THE COURT: (addressing Mr. Johnson) Didn't you come up there that evening about nine o'clock and saw him?

MR. JOHNSON: Yes, sir, I saw him about nine.

THE COURT: You had already seen him.

MR. JOHNSON: Yes, sir, I saw him about nine.

MR. CAIN: Now your Honor, we would move at this time to quash this indictment on the grounds, and this is based on information obtained from the Solicitor, and I believe the Clerk of Court. We move to quash this indictment on the grounds that negroes—negro registered electors from this county have been systematically excluded or limited from jury duty at this particular term of court. It is my understanding that there are thirty-six active jurors remaining on the present venire from which we would draw the jury at this time in this particular case. And it is my understanding that six of these people are negroes. We do not feel that this number of six out of thirty-six properly represents the overall—(interruption)

THE COURT: Are you referring to the petit jury?

MR. CAIN: Yes, sir.

THE COURT: Well, just tell me on what possible—stretch it as far as you want—what possible grounds could you move to quash the indictment on the irregularity of the petit jury?

MR. CAIN: Your Honor, this is based on Section 38-62 of the Code. Now any proof that we would get to support this contention, your Honor, would have to come from an interrogation of the jury commissioners.

THE COURT: On a petit jury?

MR. CAIN: Yes, sir.

THE COURT: You are not entitled to any such questioning of a petit jury on a motion to quash the indictment. That has nothing to do with it. This petit jury hasn't taken any action on this indictment.

MR. CAIN: Well, of course, it is our position that when the trial proceeds they will take some action.

THE COURT: Certainly, but you can't quash the indictment on that ground. If you will show me some authority, remotely bearing on it, to quash the indictment on the grounds that this petit jury is improperly or irregularly drawn.

MR. CAIN: Yes, sir, we will—we can—maybe I don't have it in the exact form. We challenge the—(interruption)

THE COURT: Your motion is the quash the indictment on the grounds that the petit jury is improperly drawn?

MR. CAIN: Yes, sir, we challenge—(interruption)

THE COURT: That is refused. That doesn't require any argument.

MR. CAIN: Well, your Honor, we move to strike this venire of jurors on the grounds that the Commissioners have not complied with Section 38-62 in making up the jury box from which this venire was drawn.

THE COURT: Well, don't you think that is the motion you should have made in the beginning?

MR. CAIN: Yes, sir, that is the correct motion. I have made it numerous times, but my notes—I didn't have time to pick them up.

THE COURT: All right, what is your showing?

MR. CAIN: All right, Sir. your Honor, we have—I believe we had the Sheriff—we had some subpoenas served or delivered to your office for service on—I don't know these people. I think I have met the Auditor outside in the hall. We would like to call Mr. L. R. Waddell.

THE COURT: Very well.

MR. CAIN: We would also like to get the Clerk of the County Registration Board.

MRS. VIVIAN WHITLOCK, being first duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. CAIN

Q. Mrs. Whitlock, you live in Florence County?

A. Yes.

Q. Do you hold a position in this county?

A. Yes.

Q. Would you speak out loud enough for everybody to hear?

A. Yes.

Q. What position do you hold?

A. I am Clerk of the Registration Board.

Q. Is that the County Registration Board?

A. Yes.

Q. How long have you been Clerk of the Registration Board?

A. About two years.

Q. All right. Would you tell the Court if you please, what your duties or responsibilities are as Clerk of the Florence County Registration Board?

A. Well, all of the duties of registering—of registering the voters.

Q. All right, maam. Now do you also keep the records and figures on the number of people registered?

A. Yes.

Q. All right. Now, do you happen to recall, or do you have any notes from which you could tell us the number of people that were registered as electors or voters on December the First, Nineteen Sixty-nine?

A. I couldn't tell you. I have it at the office, but I couldn't tell you just offhand.

Q. You have it at your office?

A. Yes.

MR. CAIN: Your Honor, could we let this witness step down and recall her later and give her a chance to get some information or notes?

THE COURT: If you will tell me exactly what you want to know.

MR. CAIN: Do you want to put that on record, too?

THE COURT: Yes.

Q. All right, now, Mrs. Whitlock, what we would like to know is the total number of persons that were registered to vote in Florence County on December the First, Nineteen Sixty-nine. Now, we would also like to know the total number of registered voters on December the First, Nineteen Sixty-nine, how many of these people were negroes. That's what we would like to know. We'd like to know the number of negroes and the number of whites.

A. The way we get our report from Columbia it might not be December the First, Nineteen Sixty-nine, but I can give you the date it was reported on.

Q. Well, that would be what date?

A. I am not sure I have one since Sixty-eight, and then I have one current.

THE COURT: The last one you had before December of Sixty-nine or January First, Nineteen Seventy.

WITNESS: I will have to check, but I could not tell you the definite date until I look at it.

MR. CAIN: I'd like to put this in the record, your Honor, we would like for you to get these numbers that come closest before December first, Nineteen Sixty-nine, from the last, you know, official information that you might have from the Secretary of State's office. All right, now, that is the information we would like to have.

(WITNESS WITHDRAWN)

MR. CAIN: Now, your Honor, while we are waiting for Mrs. Whitlock to get the information, could we now call the County Auditor and take his—

THE COURT: Yes.

L. R. WADDELL, being first duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. CAIN

Q. Mr. Waddell, we will make this brief. I understand—well, first state your full name for the record.

A. L. R. Waddell, Auditor.

Q. Now, Mr. Waddell, what is your position in Florence County?

A. Auditor of Florence County.

Q. All right, now, as Auditor, well, first of all, were you the Auditor of Florence County prior to December First, Nineteen Sixty-nine?

A. Since Nineteen Fifty-eight.

Q. And you are presently the Auditor?

A. Yes.

Q. All right, Sir, now in your capacity as the County Auditor, do you have any other responsibilities in another position?

A. Well, I have a lot of responsibilities. If you are referring to the box over there, I—(interruption)

Q. You are—are you a jury commissioner?

A. I am a member of the Jury Commission.

Q. Were you a Jury Commissioner on December the First, Nineteen Sixty-nine?

A. Yes.

Q. All right, Sir. Now, did you participate with the Clerk of Court and the County Treasurer in making up the jury box that would be used in Nineteen Seventy?

A. Yes, we made it up the latter part of Sixty-nine—I believe December of Sixty-nine.

Q. All right, Sir, would you tell the Court the procedure that you and the other Commissioners went through in making up the jury box?

A. Well, we were furnished a listing from the Registration Board which came to us from Columbia. We got one of the printers, I believe Patillo, to cut those names off, and then we had prisoners to stuff those names into capsules, and of course, they were put in the box over there, and

there are three locks on the box. I carry a key, the Treasurer carries a key and so does the Clerk of Court.

Q. Now where did you go through the mechanics of making up the jury box? Where did this take place?

A. Well, I believe they put them in several boxes when they cut them over at Strickland's, and they were brought in and of course, the prisoners worked on it and I believe they used the Grand Jury room. It took them some time—several days, to get them worked up. We had about twenty-eight thousand, I believe it figured when we finished.

Q. You had about twenty-eight thousand worked up?

A. That is what our estimation was.

Q. Now, the list of names that you used to put in these capsules—this list of names came from the Secretary of State's office?

A. Well, the Clerk of Court got the names. I understand that's where they came from.

Q. Now did you have any way of knowing, or any knowledge as to what number of these twenty-eight thousand people were black and what number were white?

A. I don't believe there is any way of knowing from the information that we had.

Q. I see. All right, now you say that the actual listing of names was done over at Patillo Printing office?

A. They were cut. The names were furnished us by the State and we had them cut. I imagine there were thirty or forty names on a page, and we had them cut.

Q. Now, as these prisoners cut these names, how did it—(interruption)

THE COURT: The prisoners did not cut a single name. That is not right. You are misquoting the witness.

WITNESS: They were cut by one of the printers and the prisoners stuffed them into the capsules.

Q. I see. Now, the printer, Patillo Printing Company, your employee, did a member of the Jury Commission supervise this work?

A. I did not.

Q. You did not? Do you know if Mr. Gregg or the Treasurer supervised it?

A. I don't know. I wasn't down there.

Q. I have one or two other questions to ask you. Mr. Waddell, did you look at the information on these pages of this listing?

A. Yes.

Q. What do you recall was on there besides the person's name?

A. Well, date of birth, occupation, a lot of it's by code, and of course, I am not familiar with the code.

Q. Does it not also have race on there?

A. I don't think so. We can look at one of them in about a second.

THE COURT: Go over there and let him look at it.

MR. CAIN: That's all right, your Honor.

THE COURT: Get one and look at it.

MR. WADDELL: First, we have to have three keys.

THE COURT: Get the keys. (Clerk goes for other keys)

Q. While he is getting this information, Mr. Waddell, let me ask you this: did the Jury Commissioners eliminate any of the people on this listing?

A. Not a soul.

Q. Didn't eliminate anybody?

A. Not a soul to my knowledge.

Q. Did the Jury Commissioners come together in a group at any one time and decide how you were going to have this work done—that is putting the capsules together?

A. Well, we have done this for years—every year it takes place about the same time.

Q. Yes, sir, but I would like an answer to my question. Did you get together and have a meeting at any time?

A. I don't think we had a special called meeting for it, no.

Q. Well, did you have an informal meeting?

A. Oh, yes, we have done that.

Q. Where did you meet?

A. That would be hard to say. It could have been the Clerk's office, it could have been in my office, it could have been in the courtroom.

Q. Did you meet in the courthouse?

A. Oh, yes, it would have been in the courthouse. We

certainly got together and discussed how we were going to do it as it is right much of a problem. (At this point, Mr. Waddell was handed a paper by the Clerk of Court)

Q. Now, Mr. Waddell, for the record, tell us what it is that Mr. Gregg handed you?

A. Well, this is one of the strips that was cut and stuffed into the capsule, and it gives the person's name and their address, and it has HW, which I assume is housewife, and it gives a date which is their age, and I don't know what these next numbers mean.

Q. All right, Sir, does this strip of paper that you hold, is it an entire—the entire record on that one person? That's all the information?

A. That's all that came on the sheet.

Q. That's all of the information you all—

A. It was cut off of the sheet that we received from the State.

Q. In other words, this strip of paper contains all of the information about this particular person—voter—that was known on the slip sent to you?

A. Yes.

Q. All right, Sir. Now, I'll ask you, and if you don't know that's perfectly all right. I'll get this later. Do you know how many people were registered in this county prior to December the First, Nineteen Sixty-nine?

A. No.

Q. You don't know?

A. No.

Q. Do you know, Mr. Waddell, if this listing, before it was sent to the Secretary of State's office, whether it has eliminated people who have died, or people who have maybe been convicted of some serious crime?

A. Not to my knowledge.

Q. You don't know?

A. No, I don't know.

Q. Mr. Waddell, how, if this list does not show anything about a person other than what you have presented here, how do you know how to eliminate anybody over sixty-five years old?

A. I said they have a date on here—date of birth.

Q. All right, Sir. Well, then, did you not—did the Jury Commissioners not remove some of those names off of the list?

A. They are removed at the time we draw the jurors if we run across a person's name who is over age—they come out then.

Q. All right, now, what time did you say you removed these names?

A. At the time we draw a petit jury.

Q. All right, Sir. Now is that the time you also eliminate people of say not good character?

A. We don't enter into a person's character. The only people we eliminate are nurses, doctors, people in transportation and railroads, and there may be one or two others—attorneys—we eliminate attorneys.

Q. Now, clear this up for me, this listing, doesn't it indicate a person's occupation?

THE COURT: Didn't you see the list? You were shown the list?

MR. CAIN: Yes, sir, I saw it, but—

A. This tells whether they are a clerk, or—

Q. Would you point that out to me, please? Your Honor, so much is abbreviated.

A. Yes, everything is abbreviated here.

THE COURT: Why would you be interested in a person's occupation?

MR. CAIN: Well, your Honor, he brought that out.

THE COURT: Well, you know it shows it, so why ask him? You are not going back into it.

MR. CAIN: No, sir, I am not going back into it?

THE COURT: Then why did you ask him?

MR. CAIN: Well, your Honor, there is one question I would like to ask him. He may have answered it but I don't recall whether he did or not.

Q. Now, Mr. Waddell, I'll ask you this question: does this listing show the race of the voters?

A. Yes.

Q. It does?

A. I reckon so. I guess that's what it is. I don't know.

I would have to see the information that they have. It might be better for her to answer that question, because I don't know.

Q. What does that show there?

A. I don't know. There is no heading—you can look at it with me. There are a lot of numbers, and GRN in one place, FEL in one place, 503 and W, and I don't know what that means. I never have gone into that. That factor doesn't enter into it. The only thing we are interested in is the person's occupation, their name and mailing address and their age.

Q. All right, Sir. Now do you know whether or not this listing that you got from the Secretary of State's office contains all of the registered voters of this county?

A. No, I couldn't say that I know that it contains all of the registered voters at that time of the county. I can say that those that we got we cut them up without separating or dividing them in any way and put them in the box, and we still have something over twenty thousand in the box now and we have been using it since January of this year.

MR. CAIN: No further questions. Thank you, Mr. Waddell. We appreciate it.

SOLICITOR: No questions.

MRS. VIVIAN WHITLOCK, recalled:

DIRECT EXAMINATION BY MR. CAIN

Q. Mrs. Whitlock, do you have the information?

A. I have on the ninth month of Sixty-eight, we have a racial breakdown, and the total was eight thousand nine hundred twenty-nine negroes, twenty thousand and five hundred ninety-four whites. I do not have it for Sixty-nine because that was not an election year and I don't have it, but I have it 4/27/70.

THE COURT: The jury box was made up before Seventy started. Do you want that information?

MR. CAIN: Yes, sir, we'd like to have it.

THE COURT: It is not vital at all—the present registration—the new registration that we have today.

MR. CAIN: No, sir, I'm talking about—oh, you mean the information which we have now. No, sir, that would not be necessary what she is talking about now—Nineteen Seventy.

THE COURT: She has already given you the last one prior.

WITNESS: There were very few added. This is not an election year.

Q. All right, Mrs. Whitlock, let me ask you this: does your office compile records on the number of people registered to vote in this county?

A. Columbia compiles all records and sends us a copy.

Q. You don't keep any records at all?

A. Our original records?

Q. Yes, maam.

A. We keep our original records and send them to Columbia, and they send it back to us. We don't total anything, but this totals it.

Q. All right, Maam, well, let me ask you this: do you know approximately how many people you have registered in Florence County in Nineteen Sixty-nine?

A. Very few in Sixty-nine. I could tell you what the total is now.

Q. No, that is not germain.

A. It wouldn't have been over a thousand, if that many.

Q. You are estimating that your Registration Board did not register more than a thousand people during Nineteen Sixty-nine?

A. I deubt it.

MR. CAIN: Your Honor, this is the key to the case—is what happened in Nineteen Sixty-nine.

THE COURT: You are presumed to be totally familiar with the Statute, and the Statute shows how a jury list is made up—the jury box.

MR. CAIN: Yes, sir.

THE COURT: It comes from Columbia. You are aware of that, I think.

MR. CAIN: No, sir. Well, your Honor, maybe I misunderstood. My information was that the Registration

Board submitted it to the Jury Commissioners, and in this list they presented to the Jury Commissioners, the Jury Commissioners made the jury box up.

THE COURT: The registration list goes to Columbia. I think you know that. It comes from the Registration Board in the County and is sent to Columbia and in turn they send these lists back.

MR. CAIN: Yes, sir. I really wasn't aware that it came from the registration, your Honor, but I found that out from Mr. Waddell. Well, now this lady has some more information which I'd like to question her about.

Q. Mrs. Whitlock, do you have—is that a page from the registration listing?

A. No. This is only a breakdown by race by precincts, with the total of negro and white at each precinct.

Q. Well, now that ledger page that you have, is that a page that comes from one of these books from the Secretary of State's office?

A. No, the one we get is different. This looks like half a page.

Q. Maam?

A. This looks like half a page.

Q. Well, do you know where that page came from?

A. From Columbia.

Q. It came from the Secretary of State's office?

A. Yes.

Q. Now, is that the same type of ledger page that they show the name and other information about a voter?

A. It's different from this. If you will come by the registration office I will be glad to show you.

Q. No, maam, we're just trying to get this right now in Court. Are you familiar with these ledger sheets that they send on the—showing the voters listed for your county?

A. Yes.

Q. Would you tell the Court, if you please, what information is shown on those ledger sheets?

A. Name, race, sex, and statistics like color of hair and eyes, registration date, address, precinct, birth date, and I think that is all.

Q. All right, Mrs. Whitlock, tell us this: isn't the ledger sheets listing the registered voters that come to your office, would it not be the same type of ledger sheet that would be sent to the Jury Commissioners?

A. It would be the same alphabetical listing, but it has a little wider space.

Q. A little wider space?

A. It has the same information.

Q. It has the same information that would come to your office? It is a duplication of the same information?

A. Yes.

MR. CAIN: Thank you very much, Mrs. Whitlock. I appreciate your coming. Your Honor, we would like to recall Mr. Waddell.

L. R. WADDELL, recalled:

DIRECT EXAMINATION BY MR. CAIN

Q. Mr. Waddell, did you hear Mrs. Whitlock's testimony?

A. Yes.

Q. All right. Now I believe you previously testified that the ledger sheets which the Secretary of State's office sends to the Jury Commissioners did not contain information such as race of the voter. Was that your testimony?

A. Yes, that's right. I was looking for it. There's the thing over there—you look at it, and if you can tell me which one is which, I'll eat your hat. It's all in code and I don't know one from the other. But even if it did, I don't see where that enters into it. We put them all in the box anyway.

MR. CAIN: No further questions. Come down. If your Honor please, we have put the officers before the Court who are charged with making up the jury box. Well, we haven't called Mr. Gregg—we'll call Mr. Gregg to the stand.

JAMES C. GREGG, being first duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. CAIN

Q. Mr. Gregg, I think everybody knows you are Clerk of Court. When did you draw the jury from which this venire was listed?

A. We drew it on a Wednesday, ten days before the commencement of this term.

Q. Were all of the Jury Commissioners present when you did this?

A. Well, Mr. Chapman wasn't there, I believe, but Mr. Poston served in his place on this particular occasion.

Q. Is Mr. Chapman Treasurer?

A. Yes.

Q. And is he the one that is sick?

A. Mr. Chapman is Treasurer and at this particular drawing I don't believe he could come as he has had a heart attack, and Mr. W. P. Poston helped draw this jury.

Q. Yes, sir. All right, Sir. Now, Mr. Gregg, to the best of your recollection did you eliminate any names?

A. Yes. I am not speaking of this particular jury but on all of the juries we draw we eliminate some names.

Q. What are the reasons that you eliminate those?

A. Well, some are excused by Statute and we take those out. And some names that we might know that are crippled and not able to serve, we will take that particular name out. if we know he is not able to perform. And then we take some names out that have no address at all on that particular thing that we have drawn.

Q. Well, the thing that you draw is the little slip of paper that Mr. Waddell referred to?

A. Yes.

Q. How many people did you draw?

A. We drew fifty on this particular venire.

Q. Is that the usual number you draw for General Sessions?

A. Yes.

Q. All right, Sir. How do you, mechanically, how do you get this—go about getting these fifty names?

A. Well, we get the Commissioners up here and each Commissioner has a separate key, and we open the box

that the juror's names are in, and we shake them up, and draw the names most of the time over there at the window. And each one of the Commissioners takes part in opening the capsules and taking out the names.

Q. You just withdraw one capsule at the time?

A. Well, each Commissioner, he just picks up some and pulls them out.

Q. All right. Do you know how many names—how many capsules you actually pulled before you were able to select fifty jurors?

A. No.

Q. You don't know? You don't keep any account of that?

A. No.

Q. Now in eliminating anyone from jury service what do you do with the names of those persons eliminated?

A. The names of them?

Q. Yes, what do you do with them? When you are going through the process of making up the jury list and you select a name—or select a capsule and withdraw a name from the capsule, when you eliminate one what do you do with it?

A. You mean in the drawing of this jury if we ran across a name that was perhaps eliminated?

Q. Yes, tell us what you do with it.

A. We throw it out.

Q. You throw it away?

A. Yes.

Q. You mean you destroy it?

A. That's right.

Q. I believe you told me that you did not know how many you all eliminated. Do you have any idea how many you eliminated?

A. No.

Q. Well, was it several?

A. On this particular jury I don't remember if we eliminated any. I know perhaps we eliminated some. On most juries we have maybe five, six or seven sometimes that we can not use on account of excused by the Statute, and some have no address.

Q. Well, you stated you eliminate some because of statutory requirements. Would that have reference to the commission of crime, or age?

A. Well, age, and of course, a crime if the Commissioners knew about a crime. But that's hard to just pick up a jury list and look at it and tell whether a person, or remembers about a crime. And of course, doctors and morticians.

Q. Well, when a name is selected out of the jury box when you are making up the list, and you think this person should be eliminated, do the Jury Commissioners discuss this?

THE COURT: Now you are going to have to get down to specific questions. You have just been asking general questions which can be characterized as a fishing expedition. You know what you want to find out and ask a question to that point, or I will stop you.

MR. CAIN: Well, of course, your Honor, the Clerk in all of his responses have been general.

THE COURT: Your questions have been general. He can only answer general questions in a general manner. If you want to know something specific, ask him.

MR. CAIN: Well, your Honor, I have asked the Clerk—(interruption)

THE COURT: You ask the Clerk, now I don't want you to start asking me questions. He's the one you want to ask. If you ask a general question, I'll just stop you and being it to the point.

Q. Mr. Gregg, what are some of the reasons that you eliminate?

THE COURT: Now you have asked him that and he has answered it already, and you are not going back into it.

Q. All right, Sir. Were any of the people that you eliminated black or any of them white?

A. I don't know.

THE COURT: That's a general question. What do you want to know about that—were they eliminated because they were black or white?

MR. CAIN: Yes, sir.

THE COURT: Then, why don't you ask him.

WITNESS: We didn't eliminate any on account of race, color or creed. If on the drawing we took out a capsule, and the occupation of this particular capsule says a doctor, we throw it out. If it says a Mortician or Pharmacist, we throw it out.

Q. But you are saying you did not eliminate anybody because of race?

A. No, sir.

Q. Just one second, your Honor, I think we are just about through. Mr. Gregg, at the time the Jury Commissioners made up this list of fifty venire, did you or the Jury Commissioners know how many of them were negroes and how many of them were white.

A. Not at the time of the drawing

Q. You did not know at that time?

A. No. These capsules are in code, and most, or a lot of the territory where they come from is also in code. It has to be broken down after we make the drawing.

MR. CAIN: All right, Sir. No further questions.

SOLICITOR: No questions.

MR. CAIN: If the Court pleases, your Honor, this is our evidence to sustain our argument here that the Jury Commissioners—we are saying that the Jury Commissioners have through a process of elimination, that they have prevented, certainly limited the number of negro electors to jury service on this venire. Now, it is my information that there are thirty-six actual jurors—that of this number there are six blacks. Our position is that through some process, even though the Commissioners deny that any practice of eliminating a person because of race took place, yet we have to face the fact that approximately thirty-two percent of the registered electors of this county even as of September, Nineteen Sixty-eight, the last date that Mrs. Whitlock had information from the Secretary of State's office. And that the six black jurors serving, or who are now on this venire is not representative of a cross section of the negro voter registration in this county.

THE COURT: You haven't shown any elimination. You are just stating by statistics it should be more. That's

what you are stating. You haven't shown any elimination at all.

MR. CAIN: Well, of course, your Honor, I will concede that the Court is correct in that observation. However, for the record we simply point out that—

THE COURT: You made your grounds stated in the record and I denied it.

MR. CAIN: Yes, sir, we will not prolong it, your Honor. That is the end of it, your Honor.

THE COURT: All right. Now I am not going to continue this case over the term. That's denied. I am giving some consideration, though, since they did not have the preliminary until last Friday or Thursday, to carrying it over until next week, but not beyond the term.

SOLICITOR: The only thing that I can state to the Court is the fact that I announced to both counsel for the defendant that my purpose would be to call this case for trial. And I asked Mr. Johnson if he was ready and he told me that he was.

THE COURT: When did you ask him?

SOLICITOR: (addressing Mr. Johnson) When did I ask you? I believe it was on yesterday, was it not?

MR. JOHNSON: Your Honor, I don't recall being asked whether I was ready. That was not my recollection. I do recall that Solicitor and I discussed it, and I asked him when he would call the case. In a conversation last week, while there was no commitment to that effect, I did come away with the understanding that this case would not come up until the last week of the term—next week, that is. But upon discussing it with the Solicitor on yesterday, he explained to me that he intended to call this case today. Because he was trying to, if possible, he said he would like to finish up this week, if he possibly could—if he reasonably could. But in any event, I did not come here prepared to try it today. I was prepared to try it next week.

THE COURT: (to Solicitor) Did you give any indication you would try it next week?

SOLICITOR: No, sir.

THE COURT: All right. The case will be called for trial in the morning.

SOLICITOR: In fact, I might state for the record, he asked me if I would continue the case beyond the term and I told him I could not do that. He asked me, well, how about trying it the second week and I told him I did not think the Court—and numerous other lawyers I told the same thing—I did not think Court would be running next week.

THE COURT: All right, Mr. Cain. (Conference of the attorneys with the Court.) The case will be called in the morning.

FOLLOWING DAY—JUNE 3, 1970

MR. JOHNSON: May it please the Court, we would make some additional motions, and to further state our position with respect to the motions we made on yesterday.

THE COURT: You had all of yesterday afternoon to make motions of any nature and I will not entertain any more motions. You had plenty of time to do it yesterday.

MR. JOHNSON: Well, may I state for the record the motions that we would make to the Court?

THE COURT: Go ahead.

MR. JOHNSON: We would move to dismiss the charge against this defendant on the grounds that his arrest on each one of these cases—that his arrest was illegal for the reason that the first three warrants, the ones relating to April Nineteenth, Twenty-sixth and the Thirtieth, all allege selling and possession, and were based upon—were signed by a police officer who had no personal knowledge of the transaction, and we would—if the Court would permit us, we would put the officer on the stand and get that testimony from him that he had no personal knowledge of the transaction. Our position is in that event that the warrant that he was arrested under was ineffective and therefore the arrest was illegal.

THE COURT: What officer are you referring to?

MR. JOHNSON: Sir?

THE COURT: What officer are you referring to?

MR. JOHNSON: I am referring to Lieutenant Lessmeister who signed the warrant.

THE COURT: You say he didn't have any knowledge of it?

MR. JOHNSON: No. sir, he wasn't personally present at the time of this alleged possession and sale on those three warrants.

THE COURT: But he signed the warrants?

MR. JOHNSON: Yes, sir.

THE COURT: On what information?

MR. JOHNSON: Well, the warrant does not purport on its face to be on information and belief. The warrant purports on its face to be on a basis of personal knowledge. Although we developed this fact in the preliminary hearing testimony, but of course, we don't have that transcript, but that is my recollection that that was the officer's testimony that he was not personally present at the time of these sales or possession.

THE COURT: Do you have a copy of the warrant?

MR. JOHNSON: YES, SIR, I believe we have

THE COURT: Do you have the warrant, Mr. Solicitor?

SOLICITOR: Yes, sir. (Warrants handed to the Court) You can make any motion you have relating to indictment 1958. We are not interested in any other indictments. They have not been called for trial.

MR. JOHNSON: Well, our position, your Honor, is that because of these prior warrants—the ones prior to the one on May Fifteenth that we are now talking about, because those warrants were defective, that—(interruption)

THE COURT: Those cases are not up for trial.

MR. JOHNSON: Right, but he was arrested on a basis of those warrants. He wasn't arrested on the Fifteenth on a basis of what he did on the Fifteenth.

THE COURT: Your motion is over-ruled. Those cases are not up for trial and your motion has no connection with this particular indictment.

MR. JOHNSON: Does his Honor understand that the prior—(interruption)

THE COURT: Do you understand what I am saying?

MR. JOHNSON: Yes, sir.

THE COURT: Your motion is over-ruled.

MR. JOHNSON: All right, Sir. We also move to dismiss, your Honor, will move if the Court permits us, on the

ground that the jail in which this defendant was incarcerated was segregated by race, and that—(interruption)

THE COURT: That motion is over-ruled.

MR. JOHNSON: Will the Court give me—(interruption)

THE COURT: I'm not going to hear you on it. I said it is over-ruled.

MR. JOHNSON: All right, Sir. We further move, your Honor, to dismiss on the ground that the defendant is charged in the indictment that he is now being brought to Court on, with simple possession, and it is our position that the warrant can not stand, it must be quashed, because the Statute under which it is based can not stand to the extent that it punishes mere possession. Now, your Honor is familiar with the cases where a defendant had in possession—and the Supreme Court of the United States held that mere possession wasn't sufficient. That a man was entitled to have—

THE COURT: Motion over-ruled.

MR. JOHNSON: May we—may I elaborate on our position with respect to yesterday's motions?

THE COURT: No, sir, you can not. You had ample time yesterday.

THE COURT: Is any member of the jury related by blood or marriage to the defendant, Gene Ham?

MR. JOHNSON: May we have the voir dire questions directed toward this jury on behalf of the defendant? We have them written out here. (List of questions handed to the Court)

THE COURT: I will not ask all of these questions. No, I can not ask these. They are not relevant. I will put them on their voir dire if you wish and ask if they can give both The State and the defendant a fair and impartial trial. These questions will not be asked, but I will ask general questions, if you so desire.

(Following is the list of defendant's proposed voir dire questions)

1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?

2. You have no prejudice against negroes? Against

black people? You would not be influenced by the use of the term "black"?

3. Would you disregard the fact that this defendant wears a beard in deciding this case?

4. Did you watch the television show about the local drug problem a few days ago when a local policeman appeared for a long time? Have you heard about that show? Have you read or heard about recent newspaper articles to the effect that the local drug problem is bad? Would you try this case solely on the basis of the evidence presented in this courtroom? Would you be influenced by the circumstances that the prosecution's witness, a police officer, has publicly spoken on TV about drugs?

THE COURT: All right, draw a jury.

CLERK: Ladies and Gentlemen, when I call your name please come forward and stand at the corner of the jury box and leave the first seat open for the Foreman. SAMMIE R. LEE, No. 43.

THE COURT: All right, now, we have to put them on their voir dire and you will have to swear each juror comes up.

CLERK: Mr. Lee, would you raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth. So help you, God.

THE COURT: Mr. Juror, we are about to enter into the trial of the case of The State v. Gene Ham, charged with illegal possession of depressants or stimulants. Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

JUROR: No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

JUROR: No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

JUROR: Yes, sir.

THE COURT: The juror is qualified.

SOLICITOR: Present him.

MR. JOHNSON: Swear him. (Juror seated)

CLERK: JAMES SIDNEY DANIELS, No. 8. Mr. Daniels, raise your right hand, please. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mr. Juror, have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Present him.

MR. JOHNSON: Strike him.

THE CLERK: You have been excused, Mr. Daniels. GEORGIA TIMMONS, No. 24. Mrs. Timmons, raise your right hand, please. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Present her?

MR. JOHNSON: Swear her. (Juror seated)

CLERK: ELIZABETH B. RIMMER, No. 12. Mrs. Rimmer, raise your right hand, please. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof, touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Are you conscious of any bias for or against the defendant, Gene Ham?

A. No, sir.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Present her.

MR. JOHNSON: Swear her. (Juror seated)

CLERK: MAYO ALTMAN, No. 20. Mr. Altman, raise your right hand. You shall well and truly answer all such questions as are propounded to you by the Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mr. Juror, have you formed or expressed any opinion as to the guilt or the innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against the defendant?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Present him.

MR. JOHNSON: Excuse him.

CLERK: You've been excused, Mr. Altman. THOMAS M. ROBINSON, No. 32. Mr. Robinson, raise your right hand. You shall well and truly answer all such questions as are propounded to your by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mr. Juror, have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against the defendant?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Excuse the juror.

CLERK: You have been excused, Mr. Robinson.

CLERK: JUNE G. SANDIFER, No. 14. Mrs. Sandifer, raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mrs. Juror, have you formed or expressed an opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias of prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Present her.

MR. JOHNSON: Swear her. (Juror seated)

CLERK: SADIE M. ROTAN, No. 17. Mrs. Rotan, raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mrs. Juror, have you formed or expressed an opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Present her.

MR. JOHNSON: Excuse the juror.

CLERK: You've been excused, Mrs. Rota.

CLERK: COLEN A. MOORE, carry-over No. 51. Mr. Moore, raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mr. Juror, have you formed or expressed an opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Present him.

MR. JOHNSON: Swear the juror. (Juror seated)

CLERK: DONALD P. VAUSE, No. 35. Mr. Vause, raise your right hand. You shall well and truly answer all such questions as are propounded to you by the Court or by order thereof, touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mr. Juror, have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Present him.

MR. JOHNSON: Swear him. (Juror seated)

CLERK: ALLEN STOKES, No. 27. Mr. Stokes, raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mr. Juror, have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against the defendant?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He's qualified.

SOLICITOR: Present him.

MR. JOHNSON: Excuse the juror.

CLERK: You've been excused, Mr. Stokes.

CLERK: JIMMY C. COLLINS, No. 30. Mrs. Collins, you shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Excuse the juror.

CLERK: You are excused, Mr. Collins.

CLERK: MARY A. GREGG, No. 3. Raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mrs. Juror, have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. Yes, sir.

THE COURT: You have?

A. Yes, sir.

THE COURT: You are conscious of bias or prejudice for or against the defendant?

A. I am.

THE COURT: Answer out.

A. I am.

THE COURT: All right, excuse this juror.

CLERK: TROY M. THIGPEN, No. 28. Mr. Thigpen,

raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Mr. Juror, have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Present him.

MR. JOHNSON: Swear him. (Juror seated)

CLERK: MALCOLM P. ROGERS, No. 33. Mr. Rogers, raise your right hand, please. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Present him.

MR. JOHNSON: Swear the juror. (Juror seated)

THE COURT: Take the foreman's seat, Mr. Rogers.

CLERK: JACK A. FARMER, No. 29. Mr. Farmer,

raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against the defendant?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Excuse him.

CLERK: You've been excused, Mr. Farmer.

CLERK: CAROLYN RAGSDALE, No. 15. Miss Ragsdale, raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Present her.

MR. JOHNSON: Swear her. (Juror seated)

CLERK: HAZEL J. HEATH, No. 19. Miss Heath, raise your right hand. You shall well and truly answer all

such questions as are propounded to you by this Court or by order thereof, touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Present her.

MR. JOHNSON: Swear her. (Juror seated)

CLERK: JOHN A. OWENS, JR. No. 48. Mr. Owens, raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: He is qualified.

SOLICITOR: Present him.

MR. JOHNSON: Swear him. (Juror seated)

CLERK: NELLIE M. KIRBY, No. 31. Mrs. Kirby, raise your right hand, please. You shall well and truly answer all such questions as are propounded to you by this Court

or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Present her.

MR. JOHNSON: Excuse the juror.

CLERK: You've been excused, Mrs. Kirby.

CLERK: VIRGINIA PERKINS, No. 44. Raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him—the defendant?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Excuse her.

CLERK: You are excused.

CLERK: PATSY P. RICHARDSON, No. 5. Mrs. Richardson, you shall well and truly answer all such questions as are propounded to you by this Court or by order thereof,

touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Excuse her.

CLERK: You are excused, Mrs. Richardson.

CLERK: EDNA W. McDUFFIE, No. 45. Mrs. McDuffie, you shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. No. I'd rather not serve.

THE COURT: The juror is excused.

CLERK: MARY ANN S. BAILEY, No. 42. Mrs. Bailey, raise your right hand. You shall well and truly answer all such questions as are propounded to you by this Court or by order thereof touching upon the matters before the Court. You shall speak the truth, the whole truth and nothing but the truth, so help you, God.

THE COURT: Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

A. No, sir.

THE COURT: Are you conscious of any bias or prejudice for or against him?

A. No, sir.

THE COURT: Can you give The State and the defendant a fair and impartial trial?

A. Yes, sir.

THE COURT: She is qualified.

SOLICITOR: Present her.

MR. JOHNSON: Swear the juror. (Juror seated)

CLERK: Mr. Foreman and Ladies and Gentlemen, I'll ask you to stand and raise your right hands and be sworn. You shall well and truly try and true deliverance make between the State of South Carolina and the prisoner at the bar whom you shall have in your charge, and a true verdict render according to law and evidence, so help you, God.

GENE LESSMEISTER, being first duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY SOLICITOR

Q. Mr. Lessmeister, I believe you are head of the City Detective Division of the City of Florence, is that correct?

A. Yes, sir.

Q. How long have you served in that capacity?

A. I have been on the Police Force twenty-four years and head of the Detective Division six years.

Q. Were you serving in that capacity on May Fifteenth, Nineteen Seventy?

A. Yes, sir.

Q. I'll ask you, Sir, if on that date you had the occasion to see the defendant, Gene Ham?

A. I did.

Q. All right, Sir. How long have you known Gene Ham?

A. Several years.

Q. Several years? Where did you see him on this particular date?

A. In the 200 block of North Dargan.

Q. The 200 block of what?

A. North Dargan.

Q. North Dargan? Was anyone else with you at the time that you saw the defendant?

A. Yes, sir, SLED Agent Reed Long and Patrolman Frierson.

Q. Patrolman Frierson and SLED Agent Reed Long, the three of you were together?

A. Yes, sir.

Q. Did you have anything with you at that time in your possession?

A. Yes, we had an arrest warrant.

Q. An arrest warrant? For whom?

A. For Gene Ham.

Q. Gene Ham?

A. Yes, sir.

Q. Did you place the defendant, Gene Ham, under arrest?

A. We did.

Q. Did you or anyone in your presence read the arrest warrant to the defendant, Gene Ham?

A. Yes, sir. Agent Reed Long read the arrest warrant to him.

Q. SLED Agent Long read the arrest warrant to him?

A. Yes, sir.

Q. Was he placed under arrest?

A. Yes, sir.

Q. All right. And where was he taken from that point?

A. He was taken to the police station.

Q. By what method or means?

A. In a patrol car.

Q. The three of you together?

A. Two of us together.

Q. Two of you together?

A. Yes, sir. Mr. Long was in the other car.

Q. In other words, you were in two different vehicles?

A. Yes, sir.

Q. All right, Sir. After you placed the defendant under arrest where did you take him?

A. Brought him to the police station.

Q. And did you book him?

A. Yes, sir.

Q. All right, Sir. And do you recall the day of the week that he was booked?

A. I believe it was on Friday.

Q. On Friday?

A. Yes, sir.

Q. All right. What happened after he was booked?

A. When he was booked he was asked to take everything out of his pockets. He placed everything out of his pockets and when he did he placed eight packages on the counter. I examined the packages and found that they contained marijuana.

Q. Just a minute now. You had eight packages?

A. Yes, sir.

Q. I'll ask you, Sir, if you can identify any one of those packages?

MR. CAIN. Now, your Honor, before he answers this question, we will object to the answer attempting to identify the package—the contents—of what he had—unless he is first qualified to show that he could identify it.

THE COURT: You will have to qualify the witness to show that he has knowledge to identify it.

Q. Mr. Lessmeister, you have in your hand a package, is that correct?

A. Yes, sir.

Q. Where did you receive that package from?

A. We received it off of Gene Ham.

Q. You received that package from Gene Ham?

A. Yes, sir.

Q. And is that eight packages there, or is that just one package?

A. This is one of eight.

Q. What did you do with the other seven?

A. The other seven I turned over to Agent Long to deliver to Lieutenant Wilson, in Columbia.

Q. All right, Sir. Is this the same package that you received—one of the eight that you received?

A. Yes, sir.

SOLICITOR: We offer this in evidence?

MR. CAIN: Now, your Honor, we would object to the introduction at this point on the grounds that the Lieutenant has not shown—it has not been shown that he has had exclusive possession of the item which was supposedly taken from Gene Ham, and that he maintained custody of that item the entire—during the period of time from the date of the arrest until—(interruption)

THE COURT: You have not shown that.

Q. All right, Sir. Now, Lieutenant Lessmeister, you received this one package I believe you stated from the defendant, Gene Ham?

A. Yes, sir.

Q. Where has this package been?

A. In my possession.

Q. Has anyone else had possession other than you?

A. No, sir.

SOLICITOR: Any objection now?

MR. CAIN: Well, your Honor, we would like to know where this particular item has been stored, or where it was kept during this period of time.

THE COURT: Well, ask him?

SOLICITOR: Where has it been stored and where has it been kept?

A. In my office in a cabinet.

MR. CAIN: Now we would like to know, your Honor, who has access to this cabinet and this room where it was kept?

THE COURT: Is the cabinet locked?

A. Yes, sir.

THE COURT: Did you have the key?

A. Yes, sir.

THE COURT: You kept the key?

A. Yes, sir.

THE COURT: It is admissible.

MR. CAIN: Your Honor, one other question: does anyone else have a key to this—(interruption)

THE COURT: I say it is in evidence. (State's Exhibit 1)

SOLICITOR: Your witness.

MR. CAIN: Your Honor, I don't believe that The State has shown the qualifications of this witness to identify it.

THE COURT: He hasn't identified it.

MR. CAIN: Thank you.

CROSS EXAMINATION BY MR. CAIN

Q. Lieutenant, I want to ask you first about this arrest warrant you had in your possession on the date that you took Gene Ham into custody. What was the date of that warrant?

A. We had four of them.

Q. You had four warrants?

A. Yes, sir.

Q. All right, Sir. You had four arrest warrants in your possession at the time you took him into custody?

A. Yes, sir.

Q. Well, at the time—now I understand that he is being tried now for possession and this is the warrant that he is being tried for now, is that correct?

A. Yes.

Q. Did you have a warrant charging him with possession of marijuana on the date of the arrest?

A. Not when he was arrested, no, sir.

Q. You did not have such a warrant?

A. No.

Q. So then, it is true then that at the time that you arrested him and he was charged with possession—that is the charge that he is answering to at this time—that you did not have an arrest warrant for possession?

A. At the time he was arrested, no.

Q. When, Lieutenant, did you issue an arrest warrant charging him with possession? What was the date of that arrest?

A. The Fifteenth, I believe.

Q. And that warrant was issued after he was arrested and taken into custody, isn't that correct?

A. Yes, sir.

MR. CAIN: Indulge me just a moment. (Conferring with associate counsel) We don't have any further questions.

REDIRECT EXAMINATION BY SOLICITOR

Q. One other question, Lieutenant: after you secured the arrest warrant on May Fifteenth, did you read that to the defendant?

A. Yes, sir.

SOLICITOR: Anything else?

MR. CAIN: Nothing further.

SOLICITOR: Come down.

REED LONG, being first duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY SOLICITOR

Q. Mr. Long, I believe you are a SLED Agent with the South Carolina Law Enforcement Division, is that correct?

A. Yes, sir.

Q. Were you serving in that capacity on the Fifteenth day of May, Nineteen Seventy?

A. Yes, sir.

Q. I'll ask you, Sir, if you had the occasion to be in the company of Lieutenant Lessmeister of the City Police Department and another officer on that date?

A. Yes, sir.

Q. Did you see the defendant, Gene Ham, on that date?

A. Yes, sir.

Q. Where did you see him?

A. In the 200 block of North Dargan.

Q. I'll ask you, Sir, if the defendant was placed under arrest at any time?

A. He was.

Q. After he was placed under arrest where was he taken?

A. To the City jail.

Q. To the City jail?

A. Yes, sir.

Q. Did you receive any packages, or see any packages from the defendant, or from Lieutenant Lessmeister?

A. I received a package to carry to Lieutenant Wilson.

Q. You received what?

A. I received a package to carry to Lieutenant Wilson.

Q. How many packages did you receive?

A. Seven.

Q. Seven?

A. Yes, sir.

Q. I'll ask you, Sir, if you can identify the object I am handing you now?

A. Yes, sir.

Q. Did you make any notations on that object?

A. Yes, sir.

Q. All right, Sir, and where did you receive that from?

A. From Lieutenant Lessmeister.

Q. And what did you do with it?

A. I carried it to Columbia.

Q. You carried it to Columbia?

A. Yes, sir.

Q. On what date?

A. 5/15/70.

Q. For what purpose did you carry it to Columbia?

A. I carried it to the lab to have it tested.

Q. And to whom did you deliver it?

A. Lieutenant Wilson.

Q. Lieutenant Wilson?

A. Yes, sir.

Q. Who is he?

A. He is head of the lab at SLED Headquarters.

Q. SLED Headquarters, is that in Columbia?

A. Yes, sir.

Q. Do you recall the date that you took it to Columbia?

A. Yes, sir, the Fifteenth.

Q. The same date?

A. Yes, sir.

SOLICITOR: All right. Answer any questions counsel might ask you.

CROSS EXAMINATION BY MR. CAIN

Q. Lieutenant Reed, were you present with Lieutenant Lessmeister when the arrest was made?

A. Yes, sir.

Q. All right, now, at the time—were you with him continuously from the time Ham was taken into custody at the jail until the package was delivered to you?

A. No, sir, not continuously.

Q. You were not present with him continuously at the jail at the time the packages supposedly were removed from him—you were not with him?

A. I was with him when the packages were removed from him, yes, sir.

Q. All right, Sir. Did Lieutenant Lessmeister turn these packages over to you in that envelope that you have now?

A. Yes, sir.

Q. Were you present when these small packages were placed in an envelope?

A. Yes, sir.

Q. You were present?

A. Yes, sir.

Q. And you saw them placed in there?

A. Yes, sir.

Q. Who placed them in the envelope?

A. Lieutenant Lessmeister.

Q. All right. Now I understand there is some writing on the face of them?

A. Yes, sir.

Q. Who put the writing on them?

A. I put part of it on here.

Q. Who put the other part on there?

A. Lieutenant Wilson, I believe.

Q. I see. Now what entry did you make on there?

A. I put Mr. Ham's name on there, the date, and my initials.

Q. These are your initials right here (indicating)?

A. Yes, sir.

Q. Now what entries did Lieutenant Wilson place, do you know?

A. He wrote this up at the top.

Q. Would you step down, please, and show this to the jury and tell them which entries you made and what entries Lieutenant Wilson made?

A. (Witness in front of jury box) I wrote Ham's name here, my initials, and the date. Lieutenant Wilson wrote this.

Q. All right, Sir, if you will take your seat back. Now after you delivered the envelope to Lieutenant Wilson did you have anything further to do with this?

A. No, sir.

Q. You did not have anything?

A. No, sir.

Q. And that's all you know about it?

A. Yes, sir.

Q. You do not know what is in the envelope—that's all right, I withdraw—

A. To my personal knowledge, no.

Q. You don't know?

A. No, sir.

Q. Lieutenant, do you remember what time it was that you and Lieutenant Lessneister came upon Gene Ham?

A. Approximately two forty-five, P. M.

Q. In the afternoon?

A. Yes, sir.

Q. Was he immediately taken to the county jail?

A. No, sir, he was carried to the city jail.

Q. I mean—I'm sorry—he was taken to the city jail immediately?

A. That is correct.

Q. Was he accompanied by anyone?

A. To the city jail?

Q. No, sir, at the time you came upon him?

A. There were some other people in the street, yes, sir.

Q. Was this sort of a business area or a residential area?

A. It was a business area.

Q. There were a number of people out on the street?

A. Yes, sir.

Q. Were any of these people, to the best of your knowledge, were they with Ham?

A. He was talking to some people on the street, yes, sir.

Q. All right, Sir. The little envelopes which are enclosed in this large manila envelope, were they in some kind of a container or bag?

A. When we got them from Mr. Ham?

Q. Yes, sir.

A. No, sir.

Q. They were just in his pocket in these little envelopes?

A. Yes, sir.

Q. Are those—were those little envelopes sealed up?

A. I don't think so—I don't think they were.

Q. You did not examine them?

A. No, sir.

MR. CAIN: We have no further questions.

REDIRECT EXAMINATION BY SOLICITOR

Q. I'll ask you, Sir, if you or anyone in your presence read this warrant to the defendant at the time of his arrest?

A. Yes, sir.

Q. Who did?

A. I did.

SOLICITOR: We offer this warrant in evidence. We withdraw that. I believe I failed to identify this. The State offers this (large manila envelope containing 7 smaller envelopes) for identification. (Marked State's Exhibit 2, Id.)

MR. CAIN: Now, your Honor, if it is only being offered for identification—

THE COURT: That's what he said, identification only.

MR. CAIN: Then we would not object.

THE COURT: Let's take a few minutes recess.

Note: During the recess, it was reported to the Court that one of the jurors was sick, viz., John A. Owens, Jr. The juror was brought before the Court and made the following statement. "Your Honor, I had an ulcer operation about a year and a half ago, and when I ate this morning, it did not pass. I am not physically able to continue here today." The Court: Excuse this juror from further attendance at this Court.

THE COURT: That leaves eleven jurors, and the defendant is entitled to twelve. (Attorneys for defendant confer)

MR. CAIN: Your Honor, we will waive the requirement for twelve jurors and proceed with the case with eleven.

THE COURT: He is entitled to twelve jurors.

MR. CAIN: Yes, sir, we waive—

THE COURT: You understand that you are entitled—I am talking to you, the defendant—you fully understand that you are entitled to twelve jurors?

DEFENDANT: I understand.

THE COURT: And you can at this time stop the trial because there are not but eleven jurors?

DEFENDANT: I understand.

THE COURT: And you waive the presence of twelve jurors and are perfectly willing to go forward with eleven jurors?

DEFENDANT: Right.

THE COURT: Answer out.

DEFENDANT: Right.

(JURY RETURNS TO COURTROOM)

LT. JAMES K. WILSON, being first duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY SOLICITOR

Q. Lieutenant Wilson, I believe you are with SLED, is that correct?

A. That's right.

Q. And in what capacity are you with SLED?

A. Laboratory Technician.

Q. I ask you, Sir, if you had any special training or schooling?

A. Yes, sir. I received a Bachelor of Science Degree from Clemson University and did graduate work at The Charleston Medical College, and have been in this work going on twenty years.

Q. Have you had occasion to testify in a Court of Law before?

A. State and Federal.

Q. In regard to Lab Technician work with SLED?

A. Yes, sir.

Q. I'll ask you, Sir, if you had the occasion to receive a package from Mr. Long, with SLED, and I will ask you if you can identify State's Exhibit 2 for identification?

A. Yes. This was the package delivered to me by Mr. Long.

Q. Did you conduct an examination on that package that you received?

A. I did on the contents, yes, sir.

Q. The contents? I'll ask you, Sir, to remove that and explain to us what you did in regard to your analysis or examination?

MR. CAIN: Now, if your Honor please, before he testifies in reply to that question, we would like for him to limit his testimony to that particular question, and not go into identification of the contents, because we don't think that he has shown- that The State has shown that he is qualified to make an analysis of the contents.

THE COURT: He has been shown to be qualified. Go ahead.

A. On May the Fifteenth, Nineteen Seventy, Agent Long delivered to me seven packages—small packages—small brown envelopes. These packages were sealed. I

opened these packages and examined the contents with a request to examine it for marijuana. These contents were examined microscopically and chemically for the contents and we found marijuana.

Q. All right, Sir. Now you said you examined them microscopically and also chemically. Tell us how you did it chemically?

A. Chemically, we have a re-agent made up of formaldehyde, vanalin, ethyl alcohol, and hydrochloric acid which gives the color reaction for marijuana—the presence of marijuana.

Q. I ask you again, Sir, what was the conclusion as to the contents of the seven packages delivered to you?

A. Each package contained marijuana.

Q. Each package contained marijuana?

A. Yes, sir.

Q. Are you able and in a position to tell us how much marijuana?

A. Approximately three grams to each package.

Q. Three grams to each package?

A. Yes, sir.

SOLICITOR: We offer these in evidence. (7 packages)

MR. CAIN: Now, before we go any further, we object to the introduction of these packages in this envelope, again on the ground that when a witness who is supposed to be qualified as an expert was examined by The State, he never at any time said that he had professional diploma or degree which qualified him as a Laboratory Technician or Laboratory Chemist. And on that basis we think that—and even though we are aware of His Honor's ruling, we think that he is unqualified.

THE COURT: He is qualified. One does not have to have a professional diploma or a degree to be qualified.

MR. CAIN: All right, Sir. Now, your Honor, we would like to show just a little further in relation to the marijuana. We believe that it might enlighten the jurors if we had an explanation of what marijuana is.

THE COURT: You can ask him.

MR. CAIN: Sir?

THE COURT: You can ask this witness.

MR. CAIN: All right, Sir.

THE COURT: But I would suggest that The State go further into it.

SOLICITOR: We offer this in evidence.

Q. Now, Lieutenant Wilson, I'll ask you have you ever had the occasion to examine marijuana before prior to this time?

A. On numerous occasions.

Q. On numerous occasions?

A. Yes.

Q. What is marijuana, do you know, of your own knowledge?

A. Yes, sir, I have seen it growing in the patch. It is a plant that grows—that grows about from thirteen to fifteen feet tall and has an odd number of leaves to each individual leaf stalk, and we have found it in this State growing numerous times.

Q. You have found it in this State?

A. Yes, sir.

Q. I'll ask you, Sir, if it has any effect on the central nervous system of the human body?

A. It is classified as an hallucigenic drug.

MR. CAIN: Now, your Honor, with respect to your ruling, we don't know that this witness is or has been qualified to tell what reaction this particular type of drug.

THE COURT: He was answering the question on a basis of classification, which he can do.

Q. What is meant by an hallucigenic drug?

A. It's mind-altering, or a mind-changing drug.

Q. A mind-altering, or mind-changing drug?

A. Yes, sir.

SOLICITOR: Answer any questions counsel might have to ask you.

CROSS EXAMINATION BY MR. JOHNSON

Q. Lieutenant, have you done any graduate work?

A. Yes, sir, I have.

Q. Do you have a graduate degree?

A. I do not.

Q. When you got your BS degree in Chemistry, your BS from Clemson, that was simply a BS in Chemistry?

A. It was a Bachelor of Science in biological sciences and a minor in chemistry.

Q. So the fact is your majored in chemistry?

A. No, I minored in chemistry. I did graduate work in chemistry, though.

Q. You don't have a Masters or a Doctorate degree?

A. I do not.

Q. Now when, exactly when did you receive this alleged drug?

A. May—it's on the package—May the Fifteenth, Nineteen Seventy.

Q. About what time did you receive it?

A. I was requested to stay after work hours to meet Mr. Long, and it was around five-thirty or a quarter to six in the afternoon.

Q. So you received it about five-thirty or a quarter to six?

A. Yes, sir. It was after working hours. I stayed there after five o'clock to meet him with this stuff—this package.

Q. And you received it from Lieutenant Long?

A. I did.

Q. Now what did you do at the time you received it at five-thirty on the Fifteenth?

A. I examined the contents.

Q. What kind of an examination did you conduct?

A. A microscopic examination at the time.

Q. You mean you looked at it under a microscope?

A. That is correct.

Q. Well, how were you able to—or how were you able to distinguish or to classify this drug on a basis of a microscopic examination as distinguished from any other material or substance?

A. First we examine marijuana—the gross observation for seed. That is one of the give-aways for identifying marijuana is the gross examination without the micro-

scope. We see these seed about the size of an okra seed. It has beans like a cocoanut. It has solid white meat inside. That's one examination. Then we go to the microscope to —(interruption)

Q. Before you go into that—isn't it a fact, Sir, that there are a number of seeds—weed seeds that grow around this State and in this County that meet the description you just gave?

A. Not with the description of the veins that run through the hull of this thing, no, sir, I have never seen one.

Q. There is no other seed to your knowledge that has veins—that has veins in it and white inside?

A. I have not seen any.

Q. All right, Sir, go on and describe the rest of the test.

A. We go from there to the microscope to identify the system it has on the outside of the leaves.

Q. To identify what?

A. The system it has. That's a non-glandular.

Q. Now what is the characteristic of a marijuana system it has?

A. It's what we call—looks like a bear claw.

Q. A what?

A. A bear claw, or bladder shaped. It's heavy on one end and pointed at the other. The other way we identify it is by the glandular hair.

Q. All right, what's the difference between a glandular hair and a non-glandular hair?

A. One has a gland up through it and the other one does not. In other words, the non-glandular hair is solid—not made up of different cells.

Q. Do you have to split the hair to find out whether it is solid?

A. No, you can see—it breaks off and you can see the inside of it through the microscope.

Q. Is it your testimony that there is no other plant or substance, that has the hair along the lines that you just described, glandular or non-glandular with the bear claw shape?

A. I haven't seen any or had any come to the laboratory to my knowledge.

Q. You are not able to say that there is no other such substance?

A. No, not for identifying this just one item under—with a microscope.

Q. Now what other tests did you run?

A. Well, we go to the other type hair that grows on marijuana. It's a glandular type hair made up of several cells with a little knot of cells on top of each hair that looks like a—you might call it a toad stool or mushroom.

Q. That's glandular hair?

A. That's the glandular hair.

Q. Now can you testify that there is no other plant hair that looks like the hair that you just described?

A. I have never observed any under a microscope and I have observed microscopic hair looking for marijuana.

Q. But you can't say that there are no others that look like that?

A. No, I can't say that.

Q. Did you run any other tests.

A. We ran the chemical test on it.

Q. Was that also on May Fifteenth?

A. No, that was done later.

Q. What date did you run the chemical test?

A. I don't remember the exact date, but it was some days later.

Q. Some days later—between the Fifteenth and the time of this trial?

A. Yes.

Q. All right, Sir. Now at the time that you made the tests other than the chemical and the microscope and just observing, were you able to make any more positive identification than you have testified here today—can you swear that this was no other substance at that time?

A. I was confident enough from the seed and from the leaf itself, that it was marijuana.

Q. Where did you put this substance? Did you conduct the examination immediately upon receiving it?

A. Yes, I did.

Q. About five-thirty or a quarter to six?

A. Yes.

Q. Now, describe for us the custody of it—where did you put it when you finished examining it?

A. It was put in my desk and stayed there until the case file was actually written up by the Secretary on May the Twenty-ninth. It was placed in a file and that afternoon it was removed, and—(interruption)

Q. Is that the afternoon of May Fifteenth?

A. May the Twenty-ninth when the report was written up. Then I came to Florence for a preliminary hearing on this case.

Q. I see. Now you put it in your desk drawer in your office?

A. Yes.

Q. You did not put it in a cabinet?

A. I put it in there later after I finished with it on the Twenty-ninth, and it stayed there until I came to a preliminary hearing, and it was placed back there until I came to Court yesterday.

Q. The fact is that it was in your desk drawer, according to your testimony, from May Fifteenth to May Twenty-ninth?

A. Yes.

Q. Now, was your desk drawer locked?

A. It's locked when I'm not there, yes.

Q. Does anyone else have a key to your desk?

A. Not to my desk, no.

Q. Your Secretary doesn't have a key to your desk drawer?

A. Not to my desk, no.

Q. Now on the Twenty-ninth—now what happened to it then?

A. The case file was written up, and it was placed in an envelope jacket and placed in a file cabinet, and was later taken out to come to a preliminary hearing here in Florence.

Q. You placed it where on the Twenty-ninth?

A. In an envelope and it was placed in a file cabinet.

Q. A file cabinet? Was that file cabinet locked at the time you put it there?

A. I didn't place it in there. The Secretary placed it there.

Q. The Secretary? You don't know whether it was locked at that time or not?

A. It wouldn't have been locked while she was in the office.

Q. It was not locked?

A. No, it was not as long as she was in the office. When she leaves to go home it is locked.

Q. Now, how many people work in that office where you had the substance?

A. Just one other person in the office that she is in.

Q. Just the Secretary and you?

A. No, one other Chemist.

Q. One other Chemist? Did anyone else have access to that cabinet—have a key to that cabinet?

A. I can obtain the key. The Secretary has the key. When we need to get in there, she let's us have the key and we get in it.

Q. There is only one key to that cabinet? You all have to go to the Secretary to get in it?

A. No, there is another lock there that has access—these other Chemists have access to this file.

Q. All right. How many Chemists have access to this file?

A. Three besides myself.

Q. In other words, four Chemists and a Secretary have access to it?

A. That is right.

Q. Now, are you able to say that this drug on your oath was not bothered in any respect by any of these four people other than yourself?

A. I've been there twenty years and no one has ever bothered any evidence when it goes to those drawers it stays in there. It is possible they could have, but not probable, and—

Q. The question was—

THE COURT: He is answering your question. Don't interrupt him.

MR. JOHNSON: Your Honor, it is not—

THE COURT: The answer is responsive. He has answered your question.

MR. JOHNSON: Did you answer the question?

WITNESS: I have answered your question.

Q. Would you repeat the answer?

A. I have been there twenty years, and the evidence that we have there is kept under lock and key when no one is there. During the day, these file cabinets are unlocked. We are busy in and out of the office. But as far as anyone tampering with the evidence, I have never known them to and I don't think they tampered with this evidence.

Q. But you can't swear that they didn't, isn't that correct?

A. I didn't see them tamper with it.

Q. All right. Lieutenant, can you tell us how many SLED Agents there are that work out of your office, or approximately?

A. A lot of our men are—(interruption)

Q. I don't mean just Chemists, I mean SLED Agents.

A. That work out of Columbia?

Q. Yes, sir.

A. The total complement?

Q. The total complement.

A. It's seventy, or better.

Q. About seventy? Now, of those seventy SLED officers, did any of them between May Fifteenth and today bring any additional substance for you all—for you four Chemists to examine?

A. In this case, or—

Q. In any other case?

A. Oh, they bring it in every day.

Q. So you have had numerous substances to examine between May Fifteenth and today?

A. Oh, yes.

Q. Now, isn't it possible, Lieutenant, out of the numerous substances that have been brought to you between May Fifteenth and today, is it not possible that they might have gotten mixed up and confused?

A. No, it is not possible.

Q. Isn't is possible that the fact is that this substance you are testifying about today is not the substance that you received from Lieutenant Long?

A. It is the substance I received on May the Fifteenth.

Q. How are you so sure of that?

A. Because it has been in my custody, it's got my name on it, it's got the defendant's name on it, the suspect's name on it, Mr. Long's initials on it, and I say it is the same substance.

Q. That's the same envelope, but you can not say that —whether the substance is the same on a basis of the envelope. The substance has—(interruption)

A. No, it has not been substituted or mixed with anything else.

Q. Would you describe this laboratory where you conducted this test? How big is it?

A. The laboratory in the chemistry end of it we have an office and a main laboratory, and where we conducted the examination we have an instrument room and what we call the dirty work state where the testing goes on where the toxic and loaded fumes are used—four rooms.

Q. You've got four rooms. All of the chemists there—all four chemists use all four rooms?

A. Yes, and then we have another room where the Secretary and one Chemist stay and work most of their day.

Q. Now in conducting these tests, isn't it a fact that you run those through—that you run a number of those tests in the course of one day?

A. It's possible, yes.

Q. When you finish with a particular drug, isn't it possible that running a test on a particular drug, isn't it possible that you leave that drug while you are attending to another?

A. No, we finish with what we are doing and then it is put back in the container, and we are very particular about this to avoid such as this. We put it back in the container and a report is written up and all of the evidence that is left goes with the report to the Secretary, and she writes it up and puts it in an envelope and it is filed, and then it stays there until we go to Court with it.

Q. All right, Sir. From the Twenty-ninth when the—when the Secretary wrote up the report until er—at what point after the Twenty-ninth was this drug removed from that cabinet?

A. Yesterday—no, Tuesday.

Q. And they were not removed from that cabinet between the Twenty-ninth and yesterday?

A. Not to my knowledge.

Q. Were they removed from the cabinet on the Twenty-ninth?

A. Yes.

Q. Who removed them?

A. I removed them.

Q. And what did you do with them?

A. Brought them to a preliminary hearing in this courthouse on Friday.

Q. And you took them back with you on the Twenty-ninth?

A. Took them back on the Twenty-ninth and they were put back in the file cabinet and locked up and then they were removed—the package was removed yesterday—Tuesday.

Q. What did you do with them yesterday—who had custody of them yesterday?

A. I had custody of them.

Q. You kept them on your person all day yesterday?

A. Yes, I did.

Q. And what about today? Did you have them on your person until they were delivered to the Solicitor today?

A. I gave them to Mr. Long a few—just before he came to the stand and he brought them to the Solicitor. Yes, they have been in my custody.

MR. JOHNSON: Nothing further.

SOLICITOR: Come down, Lieutenant Wilson.

SOLICITOR: The State rests, your Honor.

(JURY EXCUSED FROM COURTROOM)

MR. CAIN: May it please the Court, your Honor, at this time we would move for a directed verdict on the grounds first, that at the time this man was arrested on this particular charge the police department did not have in its possession a warrant dated the Fifteenth of May, charging him with possession of marijuana or any other drug. That's No. 1. No. 2, we feel that the testimony, that is the testimony adduced from the Chemist, Lieutenant Wilson, while within itself would be incriminating, yet there is certainly much room to show possibilities that in making—in running the chemical analysis or tests which was ran, that inasmuch as he ran tests on numerous drugs, or alleged drugs or items which were turned over to him for that purpose, and that these tests were ran simultaneously with the tests on the substance which was removed from Gene Ham, we respectfully submit that there is a possibility of mistaken identity as to the particular items which were in fact removed from Gene Ham. We feel that there is a possibility that the identification made here today may not necessarily be those particular items or substance which were in fact removed from Gene Ham.

MR. JOHNSON: Now, if his Honor would care to rule on that, I have some additional—

THE COURT: No, just one of you—just one can have the floor. You can't divide it up.

MR. JOHNSON: You can't divide the argument up—not on that point—

THE COURT: There's not going to be any argument.

MR. CAIN: Now, your Honor, proceeding further on our motion, we respectfully submit that The State has not submitted any testimony or evidence which would preclude that defendant did, in fact, have a prescription for the drug. Now they allege that in the indictment—in the warrant—under this section of the statute code in the indictment. There is certainly a possibility that maybe the defendant did in fact have a prescription upon which he

could have purchased these drugs. And of course, The State has failed to show that he did not have a prescription. Now the other thing is that the—that this particular statute does not anywhere mention marijuana as being one of the classified drugs as depressant—as being a depressant or stimulant. And for that reason we feel that this particular drug which has been identified by Lieutenant Wilson is not one which falls within the context of this statute. And of course, if the defendant is guilty of having marijuana we believe that he should have been charged under a different statute other than this particular one.

THE COURT: The motions are over-ruled.

(JURORS RETURNED TO COURTROOM)

GENE HAM, being first duly sworn to speak the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. JOHNSON

Q. State your name and address?

A. Gene Ham, 909 Harllee.

Q. Are you married?

A. No.

Q. What is your occupation?

A. Human rights.

Q. Human rights work?

A. That's right.

Q. Who do you work for?

A. SCLC.

Q. Is that a paid occupation?

A. Non-pay.

Q. Where were you born?

A. Florence County.

Q. When?

A. October the Twenty-ninth, Nineteen Forty.

Q. Have you spent most of your life here in Florence County?

A. Right.

Q. Have you lived a portion of your life outside of Florence County?

A. Right.

Q. Approximately how long?

A. Six years.

Q. How old are you now?

A. Twenty-nine.

Q. Of these twenty-nine years, twenty-three of them were spent right in this county?

A. Right.

Q. Did you go to school in Florence County?

A. Yes.

Q. How much education do you have?

A. High School.

Q. Where?

A. Florence and Washington.

Q. Florence, South Carolina?

A. Yes.

Q. Which school was that?

A. Wilson.

Q. Wilson High School?

A. Right.

Q. You also had some education in Washington?

A. Yes.

Q. Where did you go to school up there?

A. Cardoza.

Q. Cardoza? Is that a High School?

A. Yes, in Washington.

Q. And you finished high school?

A. Yes.

Q. Where?

A. Cardoza.

Q. Cardoza, in Washington?

A. Right.

Q. How much schooling did you get here in Florence County?

A. Eleventh grade.

Q. You finished the Eleventh grade here in Florence?

A. Right.

Q. Now how long have you been back in—did you have occasion to leave Florence, South Carolina?

A. Yes.

Q. About when?

A. About Sixty.

Q. About what?

A. About Sixty.

Q. Speak up.

A. About Sixty.

Q. About Nineteen Sixty? And where did you go then?

A. Washington.

Q. Washington, D. C.? Is that when you went to High School?

A. Yes.

Q. When did you finish High School?

A. Sixty-two.

Q. Nineteen Sixty-two? Did you continue to live in Washington?

A. Yes.

Q. When did you return to Florence County?

A. Sixty-six.

Q. Nineteen Sixty-six? In other words, approximately three years you have been back here?

A. Right.

Q. And during that period of time you were working human rights work?

A. Right.

Q. Now have you ever been convicted of a crime?

A. No.

Q. Since you got back have you had any information with respect to whether the police were after you?

A. Right.

Q. What was that information?

A. That they were out to get me.

Q. To get you for what?

A. Narcotics. I think it was based on my human rights activities.

Q. Speak up.

A. I think it was based on my human rights activities.

Q. Was that information directed to a specific officer?

A. Right.

Q. Which one was that?

A. Mr. Lessmeister.

Q. When did you get that information?

A. I got it since I have been back.

Q. Since Nineteen Sixty-six?

A. Right.

Q. You have had the information that they were out to get you?

A. Right.

Q. Did you have any information as to what they were out to get you for?

A. Narcotics was one of them.

Q. Narcotics was one of them?

A. Right.

Q. Now directing your attention to May the Fifteenth, approximately what time were you accosted by these officers?

A. About three o'clock.

Q. About three o'clock? Now where were you—where were you about two o'clock?

A. At two I think I was at the airport.

Q. Why did you go to the airport?

A. A friend was leaving.

Q. And you went for what purpose—to see him off?

A. To see him off.

Q. And at the time you were arrested had you already been to the airport?

A. Right.

Q. And where were you on your way at that time—where were you going?

A. I had just got out of a car and walked up the street when I was picked up.

Q. You had just got out of a car—whereabouts?

A. On the corner of Dargan and Darlington.

Q. And as soon as you got out of the car you were picked up?

A. About seven or eight minutes later.

Q. Were the officers there waiting when you got there, or did they come up later on?

A. I walked from the corner of Dargan and Darlington about half way up the block, and they were driving up the block then.

Q. Within seven or eight minutes after you got there?

A. Right.

Q. Now tell us what transpired at that point?

A. Three officers came up, and I think Lieutenant ax could he see me said he had four warrants for me.

Q. Four warrants? Which Lieutenant was that?

A. Lieutenant Lessmeister.

Q. Lieutenant Lessmeister? He was the one who said that?

A. Right.

Q. And he said he had four warrants?

A. Right.

Q. Did he read any warrants to you?

A. No, the SLED Agent read the warrant to me.

Q. Do you recall whether the warrant he read to you was dated—was alleging an offense on May Fifteenth?

A. No.

Q. Then what did they do after they read that warrant to you?

A. I was frisked down and put in the car and taken to the city jail.

Q. What do you mean you were frisked down? What does that mean?

A. Searched.

Q. Describe in detail exactly what happened?

A. For any objects or whatever I had on me, I guess.

Q. Were you required to lean up side of the car or a building?

A. No, I wasn't.

Q. Were you required to raise your hands?

A. Yes, I had to put my hands up.

Q. Was this out on the street?

A. Right.

Q. And a number of people were on the street at that time?

A. Yes.

Q. Now who frisked you down?

A. I can't remember. I didn't know the other officers.

Q. You don't know which one of those officers frisked you down?

A. No.

Q. Now after you were frisked down, then what happened?

A. I was put in the car and taken down to the city police station.

Q. Down to the City Police Department?

A. Right.

Q. And what happened there?

A. I was asked to remove everything from my pockets, and I did, and in removing everything out of my pockets, all of a sudden I had marijuana.

Q. Well, now, let me ask you this: did you resist the arrest in any way?

A. I did not.

Q. Did you resist the order to remove everything from your pockets in any way?

A. No.

Q. Now at the time that you were arrested on that particular—at three o'clock, or two-thirty—did you at that time have any substance on you similar to the substance that was introduced in this court in this case?

A. I did not.

Q. At the time you went to the airport did you have any such substance on you?

A. I did not.

Q. At the time that the officers came up and talked to you did you have any such substance on you?

A. No.

Q. Well, now, how did that substance get on you?

A. I don't know, unless they put it on me.

Q. Well, when did they put it on you?

A. At the police station or frisking me down.

MR. JOHNSON: All right. Answer any questions the Solicitor might ask you.

CROSS EXAMINATION BY SOLICITOR

Q. I believe you stated that you are a human rights organization, is that correct?

A. Human rights work.

Q. Human rights work? And that's a non-profit organization?

A. Right.

Q. Where do you work?

A. I work—I am a human rights worker.

Q. Well, where do you work for employment?

A. I don't have any employment.

Q. Well, where do you receive your income—you have to live, don't you?

A. From various people donations.

Q. Donations? And those donations, aren't they through—do you give them anything for those donations?

A. Service.

Q. Service?

A. Right.

Q. What do you call a service?

A. For the black people.

Q. All right, now, is one of the human rights organization that you are a member of—is one of their policies to give marijuana?

A. No, it's not.

Q. Well, is it one of them to give these pep pills or any kind of pills in order to receive a donation?

A. No.

Q. How long have you been a member of this human rights organization?

A. For quite some time.

Q. Well, since Sixty-six?

A. Approximately Sixty-six.

Q. Sixty-six. What does that emblem around your neck —is that the emblem of the organization?

A. No, that stands for black unity.

Q. Black unity?

A. Right.

Q. And you don't do anything at all to get these donations?

A. Service people.

Q. In what capacity?

A. Anywhere there is suppressed people I help them.

Q. Suppressed or depressed?

A. Suppressed.

Q. Suppressed?

A. Right.

Q. Now is it your philosophy that if you give them a drug they will get out of that suppressed condition?

A. No, it's not.

Q. It's not? Beg your pardon?

A. No.

Q. Now, let me ask you this: It is my understanding that you stated that when you were arrested you did not have this marijuana on you?

A. Right.

Q. Well, you said all of a sudden I found marijuana on me?

A. Right.

Q. How did you know it was marijuana?

A. Because the Lieutenant said so. He opened the package and said it was marijuana.

Q. He said it was, and that's the reason you knew it was marijuana because he said it was marijuana, is that right?

A. Right.

Q. And do you know what marijuana looks like?

A. I've seen it.

Q. You've seen it?

A. Right.

Q. Have you used it?

A. Have I used it?

Q. Yes.

A. Yeah, I have used it.

Q. You have used it?

A. Right.

Q. Were you using it at the time that you were arrested?

A. No.

Q. Have you ever had any marijuana on you before?

A. Not since I was around—in Washington.

Q. In Washington? In other words, you haven't had any marijuana on you since Nineteen Sixty-six?

A. Right.

Q. Is that correct?

A. Right.

Q. And the time that you used this marijuana was prior to Nineteen Sixty-six?

A. Right.

Q. Is that correct?

A. Right.

Q. And when you returned to Florence County, South Carolina, I believed you stated to counsel that the law enforcement officers were after you?

A. Right.

Q. Why were they after you?

A. Because some one had indicated that I had—that I used marijuana, and the kids were always looking for me, and my associations and things like that.

Q. What do you mean kids were always looking for you?

A. Kids had heard that I had used marijuana and they were always coming around looking for it.

Q. They were always coming around looking for it?

A. Right.

Q. In fact, isn't it true that you went to some of these High School parties, didn't you?

A. No.

Q. You never have been to a High School party?

A. To a High School party?

Q. Yes.

A. Not that I know the kids. I've been to parties—I don't know whether they were High School parties or not.

Q. Well, there were high school children there at these parties, weren't they?

A. I don't remember.

Q. You don't remember? Well, what kind of parties have you been going to?

A. What kind of parties I been going to?

Q. Yes.

A. Well, just parties, I guess, when I went to a party.

Q. Just parties? Young people were there, weren't they?

A. Some young people.

Q. Teen agers, too, weren't they?

A. I don't know, I didn't ax their age.

Q. You didn't ask their age?

A. No.

Q. But you could look at them and tell that they were fifteen, sixteen, seventeen and eighteen year olds, couldn't you?

A. Maybe eighteen or more.

Q. Eighteen or more, and they were in High School, weren't they?

A. I don't know, I didn't—

Q. Huh?

A. Maybe some of them was—I didn't ax them.

Q. All right, let me ask you this: did you have in your possession on April the Nineteenth, some *Dexonyl* No. 1?

MR. CAIN: We object, your Honor.

THE COURT: No, sir, I sustain that objection.

Q. Now, when you were arrested, who was present when you were arrested?

A. Who was present?

Q. Yes.

A. Three or four officers.

Q. Three or four officers?

A. Right.

Q. Now, did any one of them put their hands on you at the time that they arrested you?

A. Yeah, I was frisked down then.

Q. You were frisked down by whom?

A. I can't remember—one of the officers.

Q. You don't remember which one it was?

A. No, I don't.

Q. Did more than one officer at any time touch you?

A. After I got to the station I was frisked again.

Q. By whom?

A. I can't remember.

Q. Was it the same officer that frisked you down when you were arrested?

A. I can't remember.

Q. You don't remember?

A. No, I don't.

Q. All right. Now when did you discover that you had this marijuana on you?

A. As I was taking everything out of my pockets.

Q. When you were take—you took the marijuana out of your pockets yourself?

A. Right.

Q. They asked you to remove everything from your pockets and you said all right, and you reached in and pulled it out?

A. After they had frisked me down they ax me to remove the things in my pockets and I took it out.

Q. All right. Now did you at that time or any other time, from that time on, or any other time, make a statement to any one that these officers had put that stuff in your pockets?

A. Only to my lawyers.

Q. Only to your lawyers, and that was the first time that you ever made that statement, is that correct?

A. Right.

Q. Which pocket did you remove this stuff from—this marijuana?

A. I had on a jacket and it was in, I think the left pocket, and one of the officers said remove what is in your left pocket there. And I think one of the other officers took one of the packages out of my back pocket, or had it in his hand, one.

Q. You say one of the officers took something out of your back pocket?

A. Right.

Q. I thought you said a few minutes ago that you pulled the stuff out, and that you realized that you had marijuana on you.

A. Right. The one in the pocket—there was one other package that the officers took out of my back pocket.

Q. The officers took that out of your back pocket?

A. Right.

Q. Then you didn't remove everything from your pockets?

A. I don't know—he could have had it in his hand. I didn't know it was there.

Q. He could have had it in his hand—but if it was in your pocket, your back pocket, you didn't remove everything out of your pockets then, did you?

A. No.

Q. Which back pocket was it?

A. I can't remember.

Q. Well, was there anything else in that pocket?

A. No. I think he took out one of those little cloths that I clean my glasses with.

Q. He took out that—who took it out?

A. The officer.

Q. Well, then, what else did they take out of your pockets?

A. That's all.

Q. That's all. And you didn't reach in that pocket at all, did you?

A. When I was taking my things out?

Q. Yes.

A. I thought I did. I didn't, because I didn't think anything was there.

Q. I see. If you reached in that pocket you didn't find a thing in there?

A. I don't remember reaching in it because I didn't think anything was there.

Q. Do you know of any reason why they would ask you to take the things out of your pockets and you agreed, and then searched you themselves? Do you know of any reason why they would do that?

A. I don't.

Q. You do not. This pocket you say about the—with the jacket on it, did it have a flap on it, or did it zip?

A. No, just a pocket, something like this.

Q. Just a pocket something like that?

A. Right, an overall jacket.

Q. And you took that out of your overall jacket yourself?

A. Right. And I think at the time he ax—one of the polices ax me what it was and I said I don't know, and he opened the package and say it was marijuana.

Q. I see.

SOLICITOR: Nothing further.

REDIRECT EXAMINATION BY MR. JOHNSON

Q. Mr. Ham, approximately how many officers were at the jail and participated in removing these items in that room?

A. Approximately four or five.

Q. Four or five officers?

A. Right.

Q. And you therefore don't remember which one actually removed the material from your back pocket?

A. No, I don't.

Q. Do you know any other police officers in Florence other than Lieutenant Lessmeister?

A. Yeah, I think I know most of them when I see them.

Q. Do you see any of the other officers who were in that room in this courtroom that you recall?

A. No. I don't think—I don't see any of them.

Q. You don't see any more other than Lieutenant Lessmeister?

A. No.

Q. All right. This removing items from your pocket, where did this take place, if you know, which room?

A. At the desk.

Q. At the desk at the city jail?

A. Right.

Q. And there were four or five officers present?

A. Right.

Q. Now you were asked by the Solicitor, did you tell anybody that you believed this marijuana was planted on you, and I want to ask you—the answer to that question was no, except to your counsel. I want to ask you did your counsel advise you with respect to discussing this case?

A. Would you ax that again?

Q. Sir?

A. Would you repeat that?

Q. Did your lawyers give you some advice about whether or not you ought to talk about your case?

A. Right.

Q. What was that advice?

A. Not to discuss my case—the merits of my case with any one.

Q. Did your lawyer also advise you that the proper time to present your case would be in court?

A. Right.

Q. All right, Sir. Now are you a member of any organization other than the SCLC that you just referred to? Let me rephrase that question: are you a member of any official agency of this city?

A. Yeah.

Q. Which agency is that?

A. The Bi-racial Committee.

Q. The City Bi-racial Committee? How long have you been a member of that Bi-racial Committee?

A. Four months.

Q. About four months? And who appointed you to the Bi-racial Committee?

A. The people.

Q. Sir?

A. The Bi-racial Committee, the Mayor made up er—he is the founder of the committee and the people appointed me to the committee.

Q. Isn't it a fact that the people selected you and the Mayor made the appointment?

A. Right.

Q. Now who are some of the other people that you serve on that committee with?

A. Reverend Diggs, Reverend Burgess.

Q. Is that Reverend W. P. Diggs?

A. Right.

Q. What's his occupation?

A. Minister.

Q. Minister where?

A. At Trinity Baptist Church.

Q. All right, who else?

A. Reverend Burgess.

Q. What's his occupation?

A. Minister.

Q. Where?

A. At er—

Q. Is it an A.M.E. Church?

A. Yes, around there on Church Street.

Q. All right. Who else serves with you on that committee?

A. Dr. McLean.

Q. Dr. McLean? Is he a medical doctor?

A. Right.

Q. All right, Sir.

A. And the Mayor is on the committee himself.

Q. The Mayor himself is on that Committee?

A. Right.

Q. All right.

A. And Mr. Aiken.

Q. Now about how many people are there?

A. Twenty people.

Q. How many of them are black?

A. Ten.

Q. How many are white?

A. Ten.

Q. What is the function of that Committee?

A. For the betterment of Florence County.

Q. You were appointed by the Mayor to serve on that committee?

A. Right.

Q. Are you now a member of that committee?

A. Right.

THE COURT: You have asked him that—the third time now. I'll have to stop you. You can't keep asking over and over.

MR. JOHNSON: That's all I have. Come down.

MR. JOHNSON: That is the defendant's case, your Honor.

SOLICITOR: One short witness in reply.

E. J. LESSMEISTER, recalled:

DIRECT EXAMINATION BY SOLICITOR

Q. Lieutenant, you have already been sworn. Were you present when the defendant was brought in to the desk?

A. Yes, sir.

Q. The defendant testified on direct examination that they frisked him down at the desk. I'll ask you if you were present then?

A. Yes, sir.

Q. He testified that someone, or that he found for the first time that someone had marijuana in his back pocket,

I believe he stated. And that one of the officers removed that package from his back pocket. I'll ask you, Sir, if you or any officer, removed that envelope from his back pocket?

A. No, sir.

Q. If any officer had removed that article or package from his back pocket could you have seen it?

A. Yes, sir. I was standing right there.

Q. Did anyone, in fact, remove anything from the defendant himself?

A. No, sir.

Q. They did not? Did anyone place anything in the defendant's pocket?

A. No, sir.

Q. Or on his person?

A. No, sir.

SOLICITOR: Nothing further.

CROSS EXAMINATION BY MR. JOHNSON

Q. Lieutenant, did you—you were present at the time of the arrest on Dargan Street?

A. Yes, sir.

Q. Was the defendant frisked down at that time?

A. Yes, sir.

Q. Did you actually frisk him down?

A. No, sir.

Q. Which officer frisked him?

A. Patrolman Frierson.

Q. Patrolman Frierson?

A. Yes, sir.

Q. Is it at least possible that Patrolman Frierson might have put this marijuana on the defendant?

A. No, sir.

MR. JOHNSON: No further questions.

SOLICITOR: That's The State's case, your Honor.

• • • •

CHARGE OF JUDGE BAKER:

MR. FOREMAN AND LADIES AND GENTLEMEN:

The defendant, Gene Ham, is on trial for illegal possession of depressants or stimulants, it being alleged in the indictment that he did possess a quantity of drugs without medical prescription, without being prescribed or administered by a medical prescription or authority, and that such drugs or depressants would have a stimulant effect on the central nervous system. The defendant as you know has plead not guilty, and now is on trial for this jury to determine his guilt or innocence of the offense charged herein. The defendant is presumed to be innocent and this presumption of innocence stays with him and protects him, keeps him in the class of innocent men, unless there is evidence to show his guilt beyond a reasonable doubt. And if there is evidence to show his guilt beyond a reasonable doubt then the presumption of innocence is erased or removed. The presumption of innocence has this meaning. Since he is presumed to be innocent, The State must prove his guilt. The defendant is not required to prove his innocence, in that he is presumed to be innocent. Proof must be beyond a reasonable doubt, and the phrase, reasonable doubt, carries its own meaning, and that is a doubt which is based upon a reason. A reasonable doubt is not a doubt which is based upon imagination, or guess work, or speculation. Some times it is defined as a substantial doubt arising out of the evidence or lack of evidence which should have been presented. But the best remembered definition is that definition contained within the phrase itself—a doubt based upon a reason. The defendant is entitled to the benefit of a reasonable doubt if such exists, and you must resolve that doubt, if it exists, in his favor and find him not guilty. On the other hand, if his guilt has been proven beyond a reasonable doubt, then you would find him guilty. This is what is known as a statutory offense, and it is declared in the statute that the term, depressant or stimulant drug, means any substance which the State Board of Health and the appropriate Federal authorities after investigation have found to be, and by regulation designated as habit-forming, because of its stimulant effect on the central nervous system, or any drug which contains any quantity of substance which the State

Board of Health and the appropriate Federal drug authorities have found to be, and by regulation designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system, or its hallucigenic effect. Marijuana has been labelled as a depressant or stimulant drug having an effect on the central nervous system. Now, the possession of marijuana, and when I say possession I will explain that word more fully in a moment, is illegal, as you will find by this particular paragraph of the statute. It is unlawful for anyone to have possession of a depressant or stimulant drug, unless such person obtains such drug on the prescription of a practitioner—that is, a doctor, or in accordance with the section named, which section means by getting the drug from a pharmacist as a result of a prescription issued by a doctor. The statute then says that the possession of such drug which is not in a container bearing a prescription label, bearing the name and address of the doctor, the drug store or the pharmacist, the date filled, and the name of the patient for whom it is intended shall be prima facie evidence that such drug was not lawfully in the possession of such person. It is unlawful then for one to have in possession a depressant or stimulant drug. Marijuana falls within that characterization or labelization, unless the drug was obtained through a prescription issued by a practitioner—a doctor—and the prescription filled by a pharmacist. Now if one has been found in possession of such drug which is not in a container, bearing a prescription label, that is, the number of a prescription, the date the prescription was filled, the name of the patient, the name of the doctor issuing the prescription, and the name of the pharmacist, then that is prima facie evidence that the drug is not lawfully in possession of such person. Prima facie evidence means evidence which is not successfully contradicted, or explained, then becomes a fact. But simply stated and for the purposes of this case we may state that it is unlawful for one to have in his possession marijuana, unless that particular drug was obtained in lawful channels; that is, through a prescription issued by a practitioner, filled by a pharmacist, with a prescription lable on the container, bearing the name of the doctor, the patient, the pharmacist, and the number of the prescription and the date filled.

Possession means more than simply having it on your possession or in your possession. We have to add to that word possession, knowing possession. There must be shown possession of the drug by the alleged offender, and the further fact that the alleged offender knew that he had in his possession, on his person, the particular drug which it is charged, and in this case, marijuana. By way of illustration, something may be found in possession of a party or a person, and if that person didn't know that he had possession of it, had not exercised any affirmative act to get possession of it, but by some accident it came into his possession without his knowledge, then there would not be a violation of the law. But if one knowingly has in possession an illegal drug, and illegal because of the fact that he did not have a prescription therefor, then he is unlawfully in possession of such drug. So it must be shown beyond a reasonable doubt that the defendant was in possession—that he had it about his body or person the marijuana and that he knew that he had it on his person.

The State is not required to show the purpose for which the alleged offender may have had possession of the depressant or a stimulant. That is not a part of The State's required degree of proof. But The State must show beyond a reasonable doubt that there was possession of the marijuana, that the defendant knew that he had the marijuana in his possession. Now if the defendant —a defendant —is found in possession of a depressant or stimulant without the evidence of the prescription process, it would be incumbent upon him if he had legally obtained possession of the drug to show that he had it by prescription, the name of the doctor, the name of the pharmacist and when it was filled and that it was filled for his purposes.

The punishment for the offense with which the defendant is charged is a fine not exceeding Two Thousand Dollars, or imprisonment for not more than two years, or by both fine and imprisonment.

Now you jurors are the judges of what are the facts in this case. It is your duty to determine the facts from the evidence, just as it is my duty to determine the law from the issues that are presented. In passing upon the facts you jurors judge the credibility of the witnesses who have testified. You do not reject the testimony of one witness

or accept the testimony of another arbitrarily, but only when in your sound judgment there is good reason for so doing. In passing upon the credibility you have a right to take into consideration their opportunities for knowledge and observation about the matters which they have testified, any bias or prejudice they may have or may not have. In short, anything which in your good judgment tends to show you wherein lies the truth. That is your objective—to find the truth—to express that finding in the form of a verdict. And your form of verdict will be either guilty or not guilty. If there is a reasonable doubt as to the guilt or innocence of the defendant, find him not guilty. If his guilt has been proven beyond a reasonable doubt, your finding would be guilty. Write the verdict on the back of the indictment under the printed word verdict, Mr. Foreman, and you sign that verdict. And your signature will show that the verdict is the verdict of all members of the jury—all eleven members of this jury.

(JURORS RETIRE FROM COURTROOM)

THE COURT: Anything further from The State?

SOLICITOR: Nothing, your Honor.

THE COURT: From the defense?

MR. JOHNSON: Yes, sir, we—the defense will except to so much of the charge that your Honor so charged that marijuana is or has been found to be a depressant or a stimulant drug. And we further request the Court to charge that if the jury finds that The State has presented no evidence in the language of the statute, of a finding and a regulation of the State Board of Health and of the Federal Drug Authority concerning the potential for abuse and the effect on the central nervous system, or the hallucigenic effect of marijuana, then they must acquit him.

THE COURT: That request is refused.

MR. JOHNSON: The only other one we have is—would the Court hear any argument on that?

THE COURT: You haven't stated what the other one is.

MR. JOHNSON: No, sir, I mean on the first one.

THE COURT: No, I have already ruled. That is refused.

MR. JOHNSON: The only other one we have is the request that the Court charge that evidence of good character is alone sufficient to create a reasonable doubt.

THE COURT: There was no evidence of good character. You didn't have any character witnesses. I refuse that.

VERDICT: Guilty.

(AFTER PUBLICATION OF VERDICT)

MR. CAIN: May it please the Court, your Honor, at this time the defendant would like to enter a motion for judgment notwithstanding the verdict, or in the alternative we move for a new trial on the grounds that the evidence which has been presented by The State is insufficient to support the verdict of guilty, in that much of the evidence is inconsistent with that verdict. We are not going to elaborate on it, your Honor. We are just entering it in the record, subject to, of course, all of the other motions which we previously entered.

THE COURT: Do you want to re-state the other motions?

MR. CAIN: No, sir. We won't re-state them word for word, we would just like for the record to show that—such other grounds as we have already presented.

THE COURT: You want to preserve your rights under those grounds?

MR. CAIN: Yes, sir.

THE COURT: Very well.

MR. CAIN: That is our motion as of this time.

THE COURT: I think that the evidence presented a jury issue of guilt or innocence and it was properly submitted to the jury. Therefore, I can not grant the motion for judgment notwithstanding the verdict, or a new trial.

MR. CAIN: Now we will have another motion, your Honor, but I think this one should come after your sentence. This is in reference to an appeal bond.

THE COURT: Does he have a prior record?

MR. CAIN: Not to our knowledge, Sir, he does not.

THE COURT: Is there anything you desire to state, either you, or you or you (addressing the two defense attorneys and the defendant) before sentence is passed?

MR. CAIN: Well, I think that Mr. Johnson, he is Chief Counsel, he ought to—

MR. JOHNSON: Well, we would state, your Honor, that the defendant is a long term resident of this county and comes from this county—his people are here and he has bases here and that this is the first offense, and we would ask for the leniency of the Court.

THE COURT: Well, the sentence of the Court is that you be confined upon the public works of this county or in the State penitentiary for a period of eighteen (18) months. Now you said you had a motion.

MR. CAIN: Yes, sir. Our other motion, your Honor, would have to do with the Court setting an appeal bond.

THE COURT: How much bond was the defendant under?

MR. CAIN: It is my understanding, your Honor, that he was under—this is subject to correction—that he was under a thousand dollar bond on five different charges—a thousand dollars on each case.

THE COURT: A thousand dollar bond per case?

MR. CAIN: Yes, sir.

THE COURT: All right. How much bond can the defendant make. I don't want to set a bond that he can't make.

MR. CAIN: Well, your Honor, it is my understand from conferring with the Solicitor that he had a total bond of Five Thousand Dollars but there were five different charges. Now the bond was not set, so we don't know what amount of—we assume the amount that would allude to this particular charge, your Honor, would have been a thousand dollars. So that would seem to be a reasonable—on the other hand—(interruption)

THE COURT: I will set the bond at Fifteen Hundred Dollars—an appeal bond.

MR. CAIN: Yes, sir. I believe that we can—that he can raise that bond. Now, I have already talked with the Solicitor pertaining to the other charges pending, and it is my understanding that since he has not called either of those cases, that the bond which is now in effect would still be good.

THE COURT: It will be good until the other cases come up, that is correct.

MR. CAIN: We, of course, expect to file a written notice of intention to appeal, but we would like for the record to show that we made an oral motion as of this time.

Thank you, Sir.

THE COURT: Well, when he files that bond he is entitled to be released under his bond.

MR. CAIN: Thank you, Sir.

EXCEPTIONS

Defendant excepts and assigns that the trial Court erred as follows:

1. In requiring defendant's counsel to try this case without compensation.

2. In refusing to appoint counsel for the defendant as is provided for in the Defense of Indigents Act, Section 17-281, et seq., South Carolina Code, 1962 as amended.

3. In refusing to grant defendant's Motion for a continuance because of prejudicial publicity.

4. In refusing to grant defendant's Motion for a change of venue because of prejudicial publicity.

5. In refusing to hear defendant's pretrial Motions outside of the presence of the potential jurors.

6. In refusing to dismiss on the ground that defendant was denied the right to confer with his counsel while incarcerated on the night of his arrest at approximately 12:30 A.M.

7. In denying defendant's Motion for a continuance on the ground that the defendant and his counsel had inadequate time and opportunity to prepare his defenses.

8. In refusing to dismiss on the ground that the arrest was illegal because made on defective warrants.

9. In failing to exclude from the evidence the substance taken from defendant's person, which evidence was obtained through an illegal search and seizure incident to an unlawful arrest.

10. In refusing to dismiss on the ground that defendant was incarcerated in a jail where the inmates are segre-

gated on the basis of race and on the ground that defendant, a black man, was segregated in said jail on the basis of his race.

11. In failing to quash the indictment and dismiss on the ground that mere possession of marijuana, as there alleged, is not a crime under the law of South Carolina there set forth and indeed cannot constitutionally be made a crime.

12. In refusing to ask the jurors on their voir dire specific questions requested by the defense to show possible bias and prejudice against the defendant on account of his race, beard, appearance or on account of the jurors' knowledge of recent publicity on drugs, including an extensive television program conducted locally by the prosecuting officer in this case a few days before trial.

13. In refusing to ask the jurors on their voir dire the question, "Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?"

14. In refusing to ask the jurors on their voir dire the questions, "Do you have no prejudice against Negroes? Against black people? You would not be influenced by the use of the term 'black'?"

15. In refusing to ask the jurors on their voir dire the question, "Would you disregard the fact that this defendant wears a beard in deciding this case?"

16. In refusing to ask the jurors on their voir dire the questions, "Did you watch the television show about the local drug problem a few days ago when a local policeman appeared for a long time? Have you heard about that show? Have you read or heard about recent newspaper articles to the effect that the local drug problem is bad? Would you try this case solely on the basis of the evidence presented in this courtroom? Would you be influenced by the circumstances that the prosecution's witness, a police officer, has publicly spoken on TV about drugs?"

17. In refusing to sustain defendant's challenge to the petit jury venire on the ground that the venire did not represent a cross-section of the community.

18. In refusing to sustain defendant's challenge to the petit jury venire on the ground that race was a consideration in selecting the venire.

19. In refusing to sustain defendant's challenge to the petit jury venire on the ground that blacks were not represented on the venire reasonably in proportion to the black proportion of the electorate in Florence County.

20. In refusing to rule that the jury venire was drawn in a manner contrary to the requirements of Title 38 of the Code of Laws of South Carolina, 1962, as amended and particularly section 38-52 as well as sections 38-55, 38-60, 38-61, 38-61.1(6), 38-63, 38-66, 38-70, 38-82, 38-100, 38-101, 38-102, 38-104 and 38-202.

21. In ruling that one holding only a Bachelor of Science Degree with a minor in chemistry and who did some "graduate work" in chemistry of an unspecified quantity, content or nature and at an unspecified time, with no showing of having written any published works or taught in his field at the college or university level is qualified as an expert on drugs or is qualified to analyze and identify marijuana.

22. In ruling that one holding a Bachelor of Science Degree with a minor in chemistry and who did some "graduate work" in chemistry of an unspecified quantity, content or nature and at an unspecified time, with no showing of having written any published works or taught in his field at the college or university level and whose work history consists of employment as a laboratory technician is qualified to answer the question whether marijuana has any effect on the central nervous system of the human body.

23. In ruling that one holding only a Bachelor of Science Degree with a minor in chemistry and who did some "graduate work" in chemistry of an unspecified quantity, content or nature at an unspecified time and who is not shown to be employed by or have any of the responsibilities of the State Board of Health, Division of Narcotic and Drug Control, or any Federal Drug Authorities is qualified to testify as to the classification of marijuana as an hallucigenic (sic) drug".

24. in ruling that one holding only a Bachelor of Science Degree with a minor in chemistry and who did some "graduate work" in chemistry of an unspecified quantity, content or nature at an unspecified time and who is not shown

to be employed by or have any of the responsibilities of the State Board of Health, Division of Narcotic and Drug Control, or any Federal drug authorities is qualified to answer the question "What is meant by an hallucigenic drug?"

25. In refusing to direct a verdict of acquittal on the ground that defendant's arrest was illegal in that the arrest was not on a warrant alleging the offense for which defendant was tried.

26. In refusing to rule that the demonstrated possibility of mistaken identity as to the substance removed from defendant's person required a directed verdict of acquittal.

27. In refusing to permit co-counsel for the defense to divide and apportion among themselves the presentation to the Court of Motions and the grounds therefor.

28. In refusing to permit and hear arguments of defense counsel in support of motions in behalf of the defendant.

29. In refusing to direct a verdict of acquittal on the grounds that marijuana was not shown to be a depressant or stimulant drug within the meaning of the statute under which this defendant was charged.

29(a). In failing to quash the indictment on the ground that it fails to specify any statute violated by the defendant and is internally inconsistent, in that said indictment alleges that defendant "did violate Section 32-1506, *paragraph 2d* of the 1962 Code of Laws for the State of South Carolina, as amended, in that he did *possess* a quantity of drugs . . ., "there being no such statute; the second paragraph of section 32-1506 relating only to *delivery;* and the provision relating to possession being section 32-1506 (2) (d) (Emphasis added).

29(b). In failing to quash the indictment on the ground that it fails to charge a crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood, in that the indictment alleges that "he did possess a quantity of drugs, *without medical prescription and without being prescribed or administered by medical authority,* said *drugs designated* as having a potential for abuse because of its (sic) depressant or stimulant effect on the central

nervous system or its hallucinogenic effect, namely, marijuana," while the statute (32-1506 (d)) excepts possession "on the prescription of a practitioner or in accordance with section 32-1506 (a) (2)," and while the statute (32-1506 (d)) facially prohibits possession of *certain* drugs only, namely "depressant or stimulant drugs," and further while the relevant statutory definition of a depressant or stimulant drug (32-1505 (a) (3)) requires a *finding* and *designation* by *regulation of both the State Board of Health and the "appropriate Federal drug authorities"* that the drug in question has the qualities there set out (Emphasis added).

30. In refusing to direct a verdict of acquittal on the ground that if the defendant violated the law of South Carolina, he was charged under the wrong statute.

31. In reading the statute (Section 32-1505 (a) (2) (C) and 32-1505 (a) (3)) to the jurors but providing them no guidance and interpretation or providing them inadequate guidance and interpretation on its meaning and application to the evidence in this case.

32. In reading to the jurors section 32-1505 (a) (2) (C) which section was irrelevant to the indictment and to the evidence and was unnecessarily confusing.

33. In instructing the jurors that marijuana is a depressant or stimulant drug within the meaning of Section 32-1505 (a) (2) (C) and 32-1505 (a) (3), there being no evidence, or no sufficient evidence, on the record to support such a conclusion of law.

34. In instructing the jurors that the possession of marijuana is illegal unless on prescription.

35. In repeatedly instructing the jurors that the possession of marijuana is illegal.

36. In refusing to instruct the jurors that they must acquit this defendant if they find that the State has not proven any finding and regulations of the State Board of Health and of the Federal Drug Authorities, in the language of the Statute, concerning marijuana.

37. In refusing to grant defendant's Motion for judgement notwithstanding the verdict or in the alternative for a new trial on the ground that the State's evidence was insufficient to support the verdict.

38. In refusing to grant defendant's Motion for judgement notwithstanding the verdict or in the alternative for a new trial on the ground that the evidence was inconsistent with the verdict.

39. In sentencing the defendant to 75% of the maximum permitted under the statute (32-1510.3) on a first offense and where he had no prior criminal record.

40. In failing to recuse himself on the ground of bias and prejudice as is reflected in the transcript of this trial.

AGREEMENT OF COUNSEL

It is hereby stipulated and agreed by and between counsel for appellant and respondent that the foregoing, when printed or otherwise reproduced, shall constitute the Transcript of Record on appeal herein; and that printed or otherwise reproduced copies thereof may be filed with the Clerk of the Supreme Court and shall constitute the return herein.

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Solicitor, Twelfth Judicial Circuit
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MORDECAI C. JOHNSON
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FRANK E. CAIN, JR.
Bennettsville, South Carolina

By: Mordecai C. Johnson
Attorney for Appellant

Dated:

_____, 1970

Florence, South Carolina

Opinion of South Carolina Supreme Court

THE STATE OF SOUTH CAROLINA

In The Supreme Court

THE STATE

Respondent,

v.

GENE HAM

Appellant.

Appeal From Florence County
G. Badger Baker, Judge

Opinion No. 19197
Filed April 7, 1971

AFFIRMED

Mordecai C. Johnson, of Florence; Frank E. Cain, Jr., of Bennettsville; John A. Gaines, of Rock Hill; and Jack Greenberg and Jonathan Shapiro, both of New York, New York, for appellant.

Solicitor T. Kenneth Summerford, of Florence, and Assistant Attorney General Timothy G. Quinn, of Columbia, for respondent.

LITTLEJOHN, A. J.: The defendant, Gene Ham, appeals from his conviction of possession of illegal drugs in violation of §32-1506(d) (1962 Code as amended). We affirm. The facts leading to his arrest and conviction may be summarized as follows:

On May 15, 1970, the appellant was arrested in Florence on the basis of four warrants which charged him with possession of stimulant drugs. Following his arrest he was taken to the city jail and searched; the search revealed a quantity of an unidentified substance. Thereafter a fifth arrest warrant was issued charging him with possession of marijuana.

On May 28 and 29 a preliminary hearing was held and probable cause found to bind Ham over to the General

Sessions Court. On June 1, 1970, the grand jury returned true bills and on June 2 the State proceeded to trial on the indictment charging possession of marijuana.

At the conclusion of the evidence the matter was submitted to the jury which returned a guilty verdict. Motions for judgment N.O.V. and a new trial were denied. Appellant was sentenced to eighteen months and this appeal follows.

Appellant raises twelve issues for determination by this court; we deal with them as they were presented in the briefs.

Appellant contends first that his initial arrest was not made pursuant to a valid arrest warrant and that the evidence seized after the arrest was therefore inadmissible. We find from an analysis of the record that no objection to the admission of the marijuana was made at trial on this ground. At trial appellant questioned only the competency of the State's witness to identify the seized substance as marijuana.

Appellant next contends that mere possession of marijuana cannot, consistent with due process, be made a crime. He relies primarily on Stanley v. Georgia, 394 U. S. 557 (1969). Stanley dealt solely with the possession of allegedly obscene materials in one's home, and is clearly inapplicable here.

The statute itself, as the trial judge stressed in his jury charge, requires more than "mere" possession. The trial judge correctly set forth the presumption of innocence and reasonable doubt, along with the requirement of "knowing" possession.

Appellant's third contention, that a change of venue should have been granted because of prejudicial publicity, is, after an analysis of the exhibits presented, completely without merit. The two newspaper clippings and one editorial concerning drug abuse did not name the defendant or refer in any way to his trial. The trial judge did not abuse his broad discretion in this case to determine fairness. State v. Cannon, 248 S. C. 506, 151 S. E. (2d) 752 (1966).

Appellant next contends that denial of his continuance motion was prejudicial error. He cites Powell v. Alabama,

287 U. S. 45 (1932); that case involved the very different factual situation in which Negroes, accused of raping a white woman, were never given the effective aid of counsel. State v. Black, 243 S. C. 42, 132 S. E. (2d)5 (1963) relied on by appellant, involved a capital offense where the death sentence had been imposed on the defendant. There, the only experienced counsel for the defendant had become ill and was unable to effectively participate in the trial. In the case at bar appellant was continuously and ably represented. A continuance is within the broad discretion of the trial judge. State v. Harvey, 253 S. C. 328, 170 S. E. (2d) 657 (1969), and that discretion was not abused here where seventeen days elapsed from the arrest to the beginning of trial.

Appellant next contends that the trial judge erred in refusing to ask proposed voir dire questions. §38-202 (1962 Code) sets forth the basic voir dire questions required by law; that section also permits a defendant to introduce competent evidence in support of any objections to a juror. The basic questions referred to in the section were covered. Appellant has failed to carry the burden of showing that other questions should have been asked to assure a fair and impartial jury. Certainly there is no showing of an abuse of discretion allowed a trial judge in this State. State v. Britt, 273 S. C. 293, 117 S. E. (2d) 379 (1960).

Appellant's next contention is that the trial judge abused his discretion in refusing to allow counsel to withdraw as retained attorney for defendant. It is alleged that the judge should have made a factual determination that the defendant was indigent. He cites State v. Cowart, 251 S. C. 360, 162 S. E. (2d) 535 (1968) for the rule that when one claims to be indigent the judge must make an affirmative determination of indigency. Cowart is inapposite to this case in that the defendants there, two minors, appeared at the outset with no lawyer and the trial judge refused to appoint one. Here appellant had counsel for the preliminary hearing and for pretrial; he appeared with this same counsel at trial; the lawyer apparently found that Ham was unable and/or unwilling to pay and sought to be appointed so that the State could pay his fee. The prejudice, if any, resulted to the lawyer's purse and not to the appellant; it does not in any way go to the substance of appellant's conviction.

Appellant next contends that the court below committed reversible error in allowing a laboratory technician to testify as an expert witness and identify the marijuana. The witness was Lt. Wilson of the South Carolina Law Enforcement Division. He stated to the court that he had identified marijuana on numerous occasions and had seen it growing in the field. He was qualified to make the identification. The law in this State does not require a man to have a professional degree to qualify as an expert. Such determinations rest in the discretion of the trial judge. Parks v. Morris Homes Corp., 245 S. C. 461, 141 S. E. (2d) 129 (1965) and also McCormick *Evidence* §13 (1954).

Appellant's next two contentions form the substance of this appeal; we treat them as one. Basically, appellant contends that the State attempted to prove him guilty of violating the wrong statute. Appellant contends that his trial should have been under that section of the code dealing with "narcotic" drugs rather than that dealing with "depressant and stimulant" drugs.

§ 32-1506(2) (d) of the code as amended May 1, 1970, under which the indictment was brought makes unlawful,

"(d) the possession of a depressant, stimulant, counterfeit, or *illegal* drug by any person, unless such person obtained such drug on the prescription of a practitioner, or in accordance with Section 2(a) 2." (Emphasis added.)

The 1970 amendment places "illegal" drugs within the class prohibited by §32-1506(2)(d). Narcotic drugs are illegal drugs as defined in §32-1505(3)(b), and marijuana is classed as a narcotic drug in §32-1462(12) of the 1962 Code as amended.

This act became law on May 1, 1970, two weeks before appellant was arrested. It follows that appellant was indicted on the correct statute.

Appellant's next contention is that the indictment should have been quashed because it fails to allege the offense substantially in the language of the statute. Appellant did not enumerate this ground in his motion to quash, and is precluded from doing so now. There can be no doubt that the indictment placed the defendant on notice that he was charged with possession of marijuana. The language of the

indictment was clearly sufficient to advise him of the nature of the charge.

Finally, appellant contends that the imposition of an 18 month sentence on a first offender constituted cruel and unusual punishment. The sentence imposed was less than the statutory maximum and there is no showing of partiality, prejudice or corrupt motive by the sentencing judge. Thompson v. State, 251 S. C. 593, 164 S. E. (2d) 760 (1968).

Accordingly, the judgment of the lower court is

AFFIRMED.

MOSS, C. J., and LEWIS, A. J., concur. BUSSEY and BRAILSFORD, JJ., dissent.

BUSSY, A. J. (dissenting): The appellant is a locally well-known, young, black, bearded, civil or "human" rights activist, who contended, inter alia, that marijuana was planted upon him by law enforcement officers who were "out to get him." The jury panel was composed of six blacks and thirty whites. The appellant requested voir dire examination of the prospective jurors and specifically requested that the following questions, inter alia, be asked.

"1. Would you fairly try this case on the basis of evidence and disregarding the defendant's race?

"2. You have no prejudice against Negroes? Against black people? You would not be influenced by the use of the term 'black'?

"3. Would you disregard the fact that this defendant wears a beard in deciding this case?"

The trial judge declined to ask the foregoing questions, ruling that they were not relevant. Instead, His Honor asked the jurors only the three basic questions specifically required by Sec. 38-202 of the 1962 Code. Under the facts and circumstances of this case and the principles enunciated by the United States Supreme Court in the case of Aldridge v. U. S. (1931), 283 U. S. 308, 51 S. Ct. 470, 75 L. Ed. 1054, (which decision is binding upon this Court), I conclude that His Honor was in error in summarily disposing of the proposed questions as irrelevant. It was, of course, not necessary for the court to ask questions in

precisely the form presented, but under the Aldridge case it was required, I think, to inquire of the jurors whether they had any prejudice because of these particular matters which would prevent them giving a fair and impartial verdict.

The case of State v. Young, 238 S. C. 115, 119 S. E. (2d) 504, relied upon by the respondent as sustaining the action of the trial judge, is clearly distinguishable on the facts. In fairness to the lower court, his ruling in this respect finds some support in State v. Bethune (1910), 86 S. C. 143, 67 S. E. 466, and State v. Bethune (1912), 93 S. C. 195, 75 S. E. 281. The Aldridge case, supra, is however, I think controlling.

The defendant in my opinion is entitled to a new trial and I would reverse and remand to that end.

BRAILSFORD, A. J., concurs.

Order Denying Petition For Rehearing

THE SUPREME COURT OF SOUTH CAROLINA

Frances H. Smith, Clerk, P. O. Box 11358, Columbia, S. C. 29211

April 28, 1971

Mordecai C. Johnson, Esquire
P. O. Box 743
Florence, South Carolina
Re: The State v. Ham

Dear Mr. Johnson:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition denied.

s/ Joseph R. Moss C.J.
s/ J. Woodrow Lewis A.J.
s/ Bruce Littlejohn A.J.

We would grant the petition.

s/ Thos. P. Bussey A.J.
s/ J. M. Brailsford A.J.

The remittitur is being sent down today.

Very truly yours,
FRANCES H. SMITH, CLERK
By s/ Reba D. Mims
Deputy Clerk

FHS :ml
CC: The Honorable Timothy G. Quinn

Order Staying Execution of Sentence

THE SUPREME COURT OF SOUTH CAROLINA

THE STATE

—v.—

GENE HAM

Stay of execution of sentence granted for period of ninety (90) days from the date of the final judgment of this Court; and thereafter until further order of this Court if the Clerk of this Court receive notice from the Clerk of the United States Supreme Court that the petition for writ of certiorari has been filed.

/s/ JOSEPH R. MOSS C.J.
/s/ J. WOODROW LEWIS A.J.
/s/ THOS. P. BUSSEY A.J.
/s/ J. M. BRAILSFORD A.J.
/s/ BRUCE LITTLEJOHN A.J.

Columbia, South Carolina
May 12, 1971

SUPREME COURT OF THE UNITED STATES

No. 71-5139

Gene Ham,

Petitioner,

v.

South Carolina

On petition for writ of Certiorari to the Supreme Court of the State of South Carolina.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1, presented by the petition which reads as follows:

"1. Whether the trial judge's refusal to examine the jurors on voi dire as to whether petitioner's race or pretrial publicity would effect their ability to render a fair verdict violated petitioner's right to an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the Constitution?"

January 24, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.
FILED
MAR 20 197
MICHAEL RODAK, JR.,

No. 71-5139

GENE HAM,

Petitioner,

v.

STATE OF SOUTH CAROLINA.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	
The Trial Judge's Refusal To Examine the Jurors on Voir Dire as to Whether They Were Prejudiced Against Petitioner Because of His Race or Because of Their Exposure to Pretrial Publicity Violated Petitioner's Right to an Impartial Jury Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution	6
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

Aldridge v. United States, 283 U.S. 308 (1931) 6, 12, 16, 18

Bailey v. United States, 53 F.2d 982 (5th Cir. 1931) 12

Boykin v. Alabama, 395 U.S. 238 (1969) 8

Brown v. United States, 119 U.S. App. D.C. 203, 338 F.2d 543 (D.C. 1964) 12

Carter v. Jury Commissioners, 396 U.S. 320 (1970) 9

Coleman v. Alabama, 377 U.S. 129 (1964) 8

Dennis v. United States, 339 U.S. 162 (1950) 10, 12

Duncan v. Louisiana, 391 U.S. 145 (1968) 6

Epps v. State, 102 Ind. 539, 1 N.E. 491 (1885) 14

Estes v. Texas, 381 U.S. 532 (1965) 7

Fendrick v. State, 39 Tex. Cr. 147, 45 S.W. 589 (1898) 17

Foute v. State, 85 Tenn. 712 (1885) 14

Frasier v. United States, 267 F.2d 62 (1st Cir. 1959) 16

Gholston v. State, 221 Ala. 556, 130 So. 69 (1930) 16

Giles v. State, 229 Md. 370, 183 A.2d 359 (1962) 16
Groppi v. Wisconsin, 400 U.S. 505 (1971) 6, 8, 17
Hamer v. United States, 259 F.2d 274 (9th Cir. 1958), cert. denied, 359 U.S. 196 (1959) 13
Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934) 16
Irvin v. Dowd, 366 U.S. 717 (1961) 6, 7, 9, 17
Johnson v. State, 88 Neb. 565, 130 N.W. 282 (1911) 16
Jones v. People, 23 Colo. 276, 47 Pac. 275 (1898) 11
Kiernan v. Van Schaik, 347 F.2d 775 (3rd Cir. 1965) 13
King v. United States, 362 F.2d 968 (D.C. Cir. 1966) 16
Lewis v. United States, 146 U.S. 370 (1892) 9, 10
Marson v. United States, 203 F.2d 904 (6th Cir. 1953) 17
Morford v. United States, 339 U.S. 258 (1950) 12
Nobles v. State, 127 Ga. 212, 56 S.E. 125 (1906) 14
North Carolina v. Pearce, 395 U.S. 711 (1969) 7
Owens v. State, 177 Miss. 488, 171 So. 345 (1936) 16
Parker v. Gladden, 385 U.S. 363 (1966) 7
People v. Boulware, 29 N.Y.2d 135, 324 N.Y.S.2d 30 (1971) ... 12
People v. Decker, 157 N.Y. 186, 51 N.E. 1018 (1898) 17
People v. Wheeler, 96 Mich. 1, 55 N.W. 371 (1893) 11, 14
Pinder v. State, 27 Fla. 370, 8 So. 837 (1891) 16
Pointer v. United States, 151 U.S. 396 (1894) 10, 12
Reece v. Georgia, 350 U.S. 85 (1955) 8
Rideau v. Louisiana, 373 U.S. 723 (1963) 7, 9, 17
Roberson v. State, 456 P.2d 595 (Okla. Crim. 1968) 14
Santobello v. New York, ___ U.S. ___, 30 L.Ed.2d 427 (1971) 8
Sheppard v. Maxwell, 384 U.S. 333 (1966) 7, 17
Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968) .. 15, 17
Smith v. United States, 262 F.2d 50 (4th Cir. 1959) 16
State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960) 17

State v. Dooley, 89 Iowa 584, 57 N.W. 414 (1894) 14
State v. Gurrington, 11 S.D. 178, 76 N.W. 326 (1898) 14
State v. Hoagland, 39 Idaho 405, 228 Pac. 314 (1924) 14
State v. Higgs, 143 Conn. 138, 120 A.2d 152 (1956) 16
State v. Jones, 175 La. 1014, 144 So. 899 (1932) 16
State v. McAfee, 64 N.C. 339 (1870) 17
State v. Mann, 83 Mo. 489 (1884) 14
State v. Marfaudille, 48 Wash. 117, 92 Pac. 939 (1907) 14
State v. Mercier, 98 Vt. 368, 127 Atl. 715 (1925) 14
State v. Morgan, 23 Utah 212, 64 Pac. 356 (1900) 14
State v. Peterson, 255 S.C. 579, 180 S.E. 2d 341 17
State v. Pyle, 343 Mo. 875, 123 S.W.2d 166 (1938) 16
State v. Smith, 49 Conn. 376 (1881) 11
State v. Stonestreet, 112 W. Va. 668, 116 S.E. 378 (1932) 14
Stone v. United States, 324 F.2d 804 (5th Cir. 1963), cert. denied, 376 U.S. 938 (1964) 13
Strauder v. West Virginia, 100 U.S. 303 (1880) 7
Swain v. Alabama, 380 U.S. 202 (1965) 16
Swenson v. Bosler, 386 U.S. 258 (1967) 7
Thompson v. City of Louisville, 362 U.S. 199 (1960) 7
Turner v. Fouche, 396 U.S. 346 (1970) 9
Turner v. Louisiana, 379 U.S. 466 (1965) 7
United States v. Carter, 440 F.2d 1132 (6th Cir. 1971) 15, 16
United States v. Dennis, 183 F.2d 201, n. 35 (2d Cir. 1951, aff'd, 341 U.S. 494 (1951) 16
United States v. Gore, 435 F.2d 1110 (4th Cir. 1970) 16, 17
Whitus v. Georgia, 385 U.S. 545 (1967) 7
Williams v. Florida, 399 U.S. 78 (1970) 10
Zancannelli v. People, 63 Colo. 252, 165 Pac. 612 (1917) 14

Statutes and Court Rules:

Ala. Code, Tit. 15, §52 (1958) 13
§55 11

Alaska Stat. §09.20.090 (1962) 11, 13

Ariz. R. Crim. P. 217 (1956) 11
219 13

Ark. Stat. Ann. § 39-226 (1962) 14
§43-1915 (1964) 11

Cal. Pen. Code §1078 (West's 1969) 14
§1066 (West's 1970) 11

Conn. Gen. Stat. Ann. §51-240 (Cum. Supp. 1967) 14

Del. Code §11-3301 (1953) 14

Del. Super. Ct. (Crim.) R. 24 (1948) 11,14

D.C. Code Gen Sessions Ct. R. 24 (1961) 11, 14

Fed. R. Crim. P. 24(a) 11, 14

Fla. Stat. Ann. §913-02(2) (1969) 11

Fla. Stat. Crim. Pro. R. §1.290 (1968) 14

Ga. Code Ann. §59-804 (1965) 11
§59-806 14

Hawaii Rev. Stat. §635-27 (1968) 14
§635-28 11

Idaho Code Ann. §§19-2012, 2013, 2016 (1948) 11

Ill. Rev. Stat. ch. 38, §115-4 (1965) 11, 14

Ind. Stat. (Burns) §9-1054 (1956) 11

Iowa Code Ann. §779.6 (1946) 11

Kan. Stat. §22-3410 (1971) 11
§22-3408(3) 14

Ky. Rev. Stat. R. Crim. P. §§9.36, 9.38 (1970) 11, 14

La. Const. Art. I §10 . . . . . 11, 14

La. Stat. Ann. Code Crim. P. §786 (1967) 14
§797 11

Me. Rev. Stat. Ann. Tit. 15, § 1258 (1969) 14
§1259 11

Md. Ann. Code, Tit. 51, §§10, 18 (1957) 11
Rule 745 (1971) 14

Mass. Ann. Laws ch. 234, §28 (1956) 11, 14

Mich. Comp. Laws Ann. § 768.8 (1948) 14
§ 768.9 11

Minn. Stat. Ann. § 631.26 (1945) 14
§ 631.28 11

Miss. Code Ann. § 1802 (1942) 11, 14

Mo. Rev. Stat. §§ 546.120-546.160 (1959) 11

Mont. Rev. Code, Tit. 95, § 1909 (1947) 11
§ 1909(c) 14

Neb. Rev. Stat. § 29-2004 (1964) 14
§ 29-2006 11

Nev. Rev. Stat., Tit. 14 § 175.031 (1967) 14
§ 175.036 11

N.H. Rev. Stat. Ann., ch. 500-A:32; 606:1 (Cum. Supp. 1971) 14
ch. 606, § 3 (1955) 11

N.J. Stat. Ann. Tit. 2A § 78-4 (1952) 14
2A § 78-7 11

N.M. Stat. § 19-1-14 (1953) 11
§ 21-1-1 (47a) 14

N.Y. Crim. Proc. L. § 270.15 (McKinney's 1971) 14
§ 270.20 11

N.C. Gen Stat. § 9-15 (1969) 11, 14

N.D. Cent. Code § 29-17-28 (1960) 14
§ 29-17-32 11

Ohio Rev. Code § 2945.24 (1971) 11
§ 2945.27 14

Okla. Stat. Ann. § 656 (1969) 11

Ore. Rev. Stat. § 136.210 (1961) 14
§§ 17.165, 136.210 11

Pa. Stat. Tit. 19 § 811 (1964) 11, 14

R.I. Gen Laws § 9-10-14 (1956) 11, 14

S.C. Code of Laws § 38-61 (1962) 13
§ 38-202 ..... 5, 11, 14, 17

S.D. Comp. Laws §§ 23-43-28, 23-43-29 (1967) 11

Tenn. Code §22-301 (1956) 11

Tex. Code Crim. P. (Vernon's Ann.) Art. 35.16 (1965) 11
35.17 14

United States Code, Tit. 28, §1257(3) 2

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Vt. Ann. Stat., Tit. 12 §1941 (1947) 11

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ALI CODE OF CRIMINAL PROCEDURE (1931) 11, 14

1 ANNALS OF CONG. 435 (1789) 10

3 BLACKSTONE, COMMENTARIES 363 13

1 BUSCH, LAW AND TACTICS IN JURY TRIALS 9 (Encyl. ed. 1959) 9

DEVLIN, TRIAL BY JURY 30-31 (1956) 9, 13

FORSYTH, HISTORY OF TRIAL BY JURY 175 (1852) 8

HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 24 (1951) 10

1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491 (1856) 10

Note, Community Hostility and the Right to an Impartial Jury, 60 COLUM. L. Rev. 349 (1960) 13

2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE 38 (1969) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5139

GENE HAM,

Petitioner,

v.

STATE OF SOUTH CAROLINA.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at 256 S. C. 1, 180 S.E.2d 628 (1971) and is set out in the Appendix (A. 100). Petitioner was convicted upon trial by jury in the Court of General Sessions of Florence County, South Carolina, and there is no opinion with respect to that conviction.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on April 7, 1971 and a timely petition for rehearing was denied on April 28, 1971 (A. 106). The petition for writ of certiorari was filed on July 24, 1971 and certiorari was granted on January 24, 1972. The juris-

diction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether the trial judge's refusal to examine the jurors on voir dire as to whether they were prejudiced against petitioner because of his race or because of their exposure to pretrial publicity violated petitioner's right to an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Petitioner Gene Ham is a black civil rights worker who has long been active in the civil rights movement in Florence County, South Carolina (A. 73). On June 3, 1970 he was convicted after a jury trial in the Court of General Sessions of Florence County of possession of marijuana and sentenced to eighteen months upon the public works of the county or in the state penitentiary (A. 2).

Petitioner was arrested by three police officers on the afternoon of May 15, 1970 on the basis of several warrants that had been issued for his arrest (A. 4-7, 49). After his arrest he was frisked on the street, placed in a patrol car and taken to the police station (A. 75). There he was booked and asked to take everything out of his pockets (A. 50). According to the police officers, he removed eight packages from his pocket which were opened, examined, and found to contain somewhat less than an ounce of marijuana (A. 50, 60). An additional warrant charging him with possession of marijuana was then issued (A. 53).

After a preliminary hearing on May 28th and 29th, petitioner was bound over to the grand jury on each of the five charges against him, including possession of marijuana (A. 2). He was indicted on each charge on June 1st (A. 2), and on June 2nd the possession of marijuana charge was called for trial in the General Sessions Court (A. 8).

Petitioner's motion for a continuance on the ground that he had not been able, on one day's notice, to file motions or prepare for trial was denied, and counsel was directed to make all motions orally (A. 11). His motion for a change of venue or for a continuance on the ground of prejudicial publicity was summarily overruled (A. 12). A brief hearing was then held on his motion to strike the petit jury venire on the ground that Negroes had been systematically excluded (A. 17). Despite his showing that only six (17%) of the thirty-six petit jurors who were available for his case were black although 32% of the names in the jury box were of blacks, and that the trial venire was selected from slips of paper on which the race of the juror was indicated, the motion was denied (A. 31-32). Over petitioner's objection, the trial on the merits was set for the following day (A. 32).

At the beginning of the selection of the jury, petitioner requested that the judge put the prospective jurors on voir dire and ask them the following questions:

1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?
2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term "black?"
3. Would you disregard the fact this defendant wears a beard in deciding this case?
4. Did you watch the television show about the local drug problem a few days ago when a local policeman appeared for a long time? Have you heard about recent newspaper articles to the effect that the local drug problem is bad? Would you try this case solely on the basis of the evidence presented in this courtroom? Would you be influenced by the circumstances that the prosecution's witness, a police officer, has publicly spoken on TV about drugs?" (A. 35-36).

The judge refused to ask any of these proposed questions on the ground that "[t]hey were not relevant" (A. 35). Instead, he asked generally whether any member of the panel was related by blood or marriage to petitioner (A. 35), and addressed the following three questions to each juror individually:

"Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

"Are you conscious of any bias for or against him?

"Can you give the State and the defendant a fair trial?" (A. 36-48).

Two jurors were excused by the court because of their answers to these questions.[1] No one was challenged for cause by either the State or petitioner, but each side exhausted its five peremptory challenges (A. 37, 39, 40, 41, 42, 44, 46, 47).

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[1] One juror answered in the affirmative to the first two questions (A. 42), and one juror answered "no" to the third question (A. 47).

The State's case consisted only of testimony that eight packages had been discovered among petitioner's personal belongings when he had been searched at the police station after his arrest (A. 50), and that the packages had been found to contain a small quantity of marijuana (A. 60). Petitioner took the stand in his own defense and testified that the first time he had seen the package was when he removed the contents of his pockets (A. 76). He stated that he had not had the packages in his possession at any time before he was arrested, and could only speculate that the police officers had planted them in his pockets when he was frisked or later at the police station (A. 77). He also testified that he had heard that the local police were "out to get him" because of his civil rights activities, which included working for the Southern Christian Leadership Conference (SCLC) and being a member of the Bi-Racial Committee of the City of Florence (A. 71, 73-74, 85).

The jury returned a verdict of guilty and, despite the fact that it was a first offense, petitioner was sentenced to eighteen months imprisonment (A. 92). A motion for judgment notwithstanding the verdict or for a new trial, which preserved his rights on appeal under all motions and objections raised during the trial, was denied (A. 92).

On appeal, petitioner assigned as error the refusal of the trial court to examine the jurors on voir dire with respect to racial prejudice or their exposure to pretrial publicity and argued that such refusal violated his right to an impartial jury guaranteed by the Fourteenth Amendment to the Constitution.[2] A divided South Carolina Supreme Court affirmed petitioner's conviction. The majority held that the trial judge had asked the basic questions required by §38-202 S. C. Code (1962),[3] and had not abused his discretion in refusing to ask others.

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[2]Brief of Appellant, p. 15; Reply Brief, pp. 3-7.

[3]This section provides:

"§38-202. *Jurors may be examined by court; if not indifferent, shall be set aside.* — The Court shall, on motion

Noting that petitioner was a "black, bearded, civil or human rights activist," two of the five Justices dissented on the ground that the trial court's refusal to examine the jurors was in conflict with the decision of the United States Supreme Court in *Aldridge v. United States*, 283 U.S. 308 (1931), which they considered binding on the States. A petition for rehearing was denied over the same dissenting votes (A. 106).

ARGUMENT

THE TRIAL JUDGE'S REFUSAL TO EXAMINE THE JURORS ON VOIR DIRE AS TO WHETHER THEY WERE PREJUDICED AGAINST PETITIONER BECAUSE OF HIS RACE OR BECAUSE OF THEIR EXPOSURE TO PRETRIAL PUBLICITY VIOLATED PETITIONER'S RIGHT TO AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth and Fourteenth Amendments guarantee a criminal defendant a trial by an impartial jury. *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Duncan v. Louisiana*, 391 U.S. 717 (1961); *Irvin v. Dowd*, 366 U.S. 717 (1961). This Court has said:

> "In essence, the right to jury trial guarantees to the accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co Litt 155 b. His verdict must be based on evidence developed at the trial . . ." [4]

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of either party in the suit, examine on oath any person who is called as a juror therein to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause and another shall be called."

[4] *Irvin v. Dowd, supra*, 366 U.S. at 722.

Unless the impartiality of the jury can be assured, the fundamental right to a fair trial will itself be rendered meaningless.

It cannot be doubted that the right to an impartial jury requires a panel of jurors who are free from prejudice against the defendant because of his race or because of their exposure to pretrial publicity. As long ago as 1880 this Court held that the "apprehended existence of prejudice" against a black criminal defendant from a jury from which blacks had been systematically excluded required the reversal of his conviction. *Strauder v. West Virginia*, 100 U.S. 303 (1880). In order to prevent racial prejudice from affecting the impartiality of juries, an unbroken line of cases since that time has condemned any racial discrimination in the jury selection process. *Whitus v. Georgia*, 385 U.S. 545 (1967). Similarly, the right of the accused to a jury determination based only upon the evidence presented at a trial has been recognized as one of the fundamental guarantees of due process. *Irvin v. Dowd, supra*, 366 U.S. at 722; *Thompson v. City of Louisville*, 362 U.S. 199 (1960). And this Court has been particularly sensitive to the denial of this right by prejudicial publicity and extra-judicial statements. *Parker v. Gladden*, 385 U.S. 363 (1966); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Turner v. Louisiana*, 379 U.S. 466 (1956); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

It is well established that where federal constitutional rights such as the right to an impartial trial are at stake, federal law requires that the States make available the means that are necessary to safeguard those rights. *Swenson v. Bosler*, 386 U.S. 258 (1967).[5] Only recently this Court

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[5] In several different areas, this Court has held that specific state court procedures are necessary to adequately insure the protection of federal rights. Thus, a state court is constitutionally required to give a statement of reasons for an increased sentence after a second conviction of a successful appellant in order to provide assurance that he is not being penalized for the exercise of his right to appeal, *North*

recognized that since a change of venue may provide the only means by which to assure an impartial jury, a State could not constitutionally bar changes of venue in all misdemeanor cases. *Groppi v. Wisconsin, supra.* Thus, it was held that "under the Constitution a defendant must be given an opportunity to show that a change of venue *is* required in *his* case." *Id.* at 511. (Emphasis in original). Just as a defendant is constitutionally entitled to show that a change of venue is required to insure an impartial jury, *Groppi v. Wisconsin, supra*, so too must he be entitled to an adequate means to select an impartial jury in the venue in which he is tried. In the present case, petitioner contends that his right to an impartial jury can only be vouchsafed if he is given a meaningful opportunity to challenge for cause prospective jurors who are prejudiced against him because of his race or because of their exposure to pretrial publicity.

The right to challenge prospective jurors for cause on account of bias or prejudice is essential to the constitutional guarantee of an impartial trial because it is the principal, if not the only, means by which a criminal defendant can secure an impartial jury.[6] Even the fairest procedures by which master jury lists are compiled can at best only

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Carolina v. Pearce, 395 U.S. 711 (1969); it cannot sentence a defendant on a guilty plea where any aspect of the prosecutor's plea-bargaining promise has not been kept, in order to insure against the involuntary waiver of his constitutional right to a jury trial, *Santobello v. New York*, ___ U.S. ___, 30 L.Ed.2d 427 (1971); it cannot accept a guilty plea unless the prerequisites of the plea affirmatively appear on the record, *Boykin v. Alabama*, 395 U.S. 238 (1969); and it must give a defendant an opportunity to introduce evidence in support of his claim that the jury selection procedure violated his rights under the Fourteenth Amendment, *Coleman v. Alabama*, 377 U.S. 129 (1964); *Reece v. Georgia*, 350 U.S. 65 (1956).

[6]See W. FORSYTH, HISTORY OF TRIAL BY JURY 175 (1852); DEVLIN, TRIAL BY JURY 30-31 (1956); Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 354 (1960).

provide juries that represent a "cross-section" of the community and cannot guarantee that the jurors selected will be unbiased toward a particular defendant. *Carter v. Jury Commissioner*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970). Similarly, the right to a continuance or to a change of venue only serves to reduce the likelihood of prejudice to a defendant which may result from community hostility in connection with a particular case. *Irvin v. Dowd, supra*; *Rideau v. Louisiana*, 373 U.S. 723 (1963). Indeed, a continuance or change of venue is available in many jurisdictions only after a defendant has been unable to secure an impartial jury through his exercise of challenges.[7] It is, therefore, only through the right of challenge that the defendant can eliminate from the jury which may strip him of liberty or life those individuals who are actually prejudiced against him. As one authority has stated:

> "Trial by jury will be useless as a safeguard for the subject . . . if it means trial by a packed jury. Therefore the precautions which the law takes to secure that a jury is unbiased and independent must be preserved . . ."[8]

The right of challenge for cause on account of bias or prejudice is also a fundamental component of the right to a jury trial. As this Court has recognized, "the right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury." *Lewis v. United States*, 146 U.S. 370, 376 (1892). As early as the middle of the thirteenth century, Bracton wrote that exceptions could be taken to individual jurors on the ground of a previous conviction for perjury, serfdom, consanguinity, affinity, enmity, or close friendship.[9] And by the middle of the fifteenth century, most of

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[7] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Fair Trial and Free Press*, 126-127 (Approved Draft 1968).

[8] DEVLIN, *supra*, n. 5, at 31

[9] 1 BUSCH, LAW AND TACTICS IN JURY TRIALS 9 (Encyl. ed. 1959).

the incidents of the modern jury trial, including the right of challenge, had become settled.[10] Although a specific reference to the right of challenge was not included in the Sixth Amendment,[11] it has always been recognized in this country as a fundamental element of a jury trial, embraced by the guarantee of an "impartial" jury.[12] It is guaranteed to a criminal defendant under the law of every State and

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[10] *Ibid.*

[11] Because of the objections to the absence of an explicit provision saving the right to challenge prospective jurors in Article III of the Constitution, the Sixth Amendment originally contained such a provision when introduced in the House by James Madison. HELLER, THE SIXTH AMENDMENT 24 (1951). This version provided that:

> "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge and other accustomed requisites . . ." 1 ANNALS OF CONG. 435 (1789).

Largely at the insistence of the Senate, however, the Amendment was altered to eliminate the specific references to the common law features of a jury trial. HELLER, *supra* at 31-33. The reason for these deletions is unclear because there is no record of the Senate debates on the Sixth Amendment. *Id.* at 31. However, in two letters to Edmund Pendleton, Madison wrote that the vicinage requirement was the only feature of the common law jury that was specifically objected to by the Senate. 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491, 492-93 (1865); see *Williams v. Florida*, 399 U.S. 78, 94-96 (1970). In the absence, therefore, of any concrete evidence that the Senate opposed the right of challenge, its deletion from the Amendment cannot be taken as an indication that Congress did not intend the right of challenge to be part of the constitutional right to a jury trial. On the contrary, it is at least as likely that the Senate's action in streamlining the Madison version rested on the "assumption that the most prominent features of the jury would be preserved as a matter of course." *Williams v. Florida, supra*, 399 U.S. at 123 n. 9 (Harlan, J. Concurring).

[12] HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 71 (1951); see *Dennis v. United States*, 339 U.S. 162 (1950); *Pointer v. United States*, 151 U.S. 396 (1894); *Lewis v. United States*, 146 U.S. 370 (1892).

the District of Columbia,[13] and is established practice in the federal courts.[14] The right of challenge for cause, therefore,

[13]The right of challenge is guaranteed specifically by statute in most states, and in other states by either court rule or decisional law. See ALA. CODE, Tit. 15, §55 (1958); ALASKA STAT. §09.20.090 (1962); ARIZ. R. CRIM. P. 219 (1956); ARK. STAT. ANN. §43-1915 (1964); CAL PEN. CODE §1066 (West's 1970); *Jones v. People*, 23 Colo. 276, 47 Pac. 275 (1898); *State v. Smith*, 49 Conn. 376 (1881); DEL. SUPER. CT. (CRIM.) R. 24 (1948); D.C. CODE GEN SESSIONS CT. R. 24 (by inference) (1961); FLA. STAT. ANN. §913-02(2) (1969); GA. CODE ANN. §59-804 (1965); HAWAII REV. STAT. §635-28 (1968); IDAHO CODE ANN. §§19-2012, 2013, 2016 (1948); ILL. REV. STAT. ch. 38, §115-4 (1965); BURNS IND. STAT. §9-1054 (by inference) (1956); IOWA CODE ANN. §§779.6 (1946); KAN. STAT. §22-3410 (1971); KY. REV. STAT. R. CRIM. P. §§9.36, 9.38 (1970); LA. CONST. ART. I §10; LA. STAT. ANN. CODE CRIM. P. §797 (1967); ME. REV. STAT. ANN., tit. 15, §1259 (1969); MD. ANN. CODE, tit. 51, §§10, 18 (1957; MASS. ANN. LAWS ch. 234, §28 (1956); MICH. COMP. LAWS ANN. §768.9 (1948); *People v. Wheeler*, 96 Mich. 1, 55 N.W. 371 (1893); MINN. STAT. ANN. §631.28 (1945); MISS CODE ANN. §1802 (by inference) (1942); MO. REV. STAT. §§546.120-546.160 (1959); MONT. REV. CODE, tit. 95, §1909 (1947); NEB. REV. STAT. §29-2006 (by inference (1964); NEV. REV. STAT., tit. 14, §175.036 (1967); N.H. REV. STAT. ANN., ch. 606, §3 (1955); N. J. STAT. ANN., tit. 2A §78-7 (1952); N. M. STAT. §19-1-14 (1953); N. Y. CRIM. PROC. L. §270.20 (McKinney's 1971); N. C. GEN. STAT. §9-15 (1969), N. D. CENT. CODE §29-17-32 (1960); OHIO REV. CODE §2945.24 (by inference) (1971); OKLA. STAT. ANN. §656 (1969); ORE. REV. STAT. §§ 17.165, 136.210 (1961); PA. STAT. tit. 19 §811 (1964); R. I. GEN. LAWS §9-10-14 (1956); S. C. CODE OF LAWS §38-202 (1962); S.D. COMP. LAWS §§23-43-28, 23-43-29 (1967; TENN. CODE §22-301 (1956); TEX. CODE CRIM. P. (Vernon's Ann.) Art. 35.16 (1965); UTAH CODE §77-30-16 (1953); VT. ANN. STAT., tit. 12 § 1941 (1947); VA. CODE §§ 8-199, 19.1-206 (1960); WASH. REV. CODE ANN. §10.49. 040 (1961); W. VA. CODE §62-3-4 (1966); WIS. STAT. ANN. §§957.14, 290.16 (1957); WYO. STAT. §7-222 (1957); WYO. R. CRIM. P. 25 (1968). See ALI CODE OF CRIMINAL PROCEDURE, 109-110, 822 (Official Draft 1931); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury* 67 (Approved Draft 1968).

[14]FED. R. CRIM. P. 24(a); see 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE 38 (1969).

is not only essential to the enforcement of the right to an impartial jury, but it has an independent source in the Sixth Amendment's right to a jury trial.

In order to exercise effectively his constitutional right to challenge for cause jurors who are prejudiced against him by reason of his race or pretrial publicity, a criminal defendant must be provided with some procedure for examining prospective jurors with respect to their biases and prejudices. As this Court has said, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-172 (1950). And the right of challenge would indeed be a hollow guarantee unless the defendant were "brought face to face in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice." *Pointer v. United States*, 151 U.S. 196, 409 (1894).[15]

In the absence of a voir dire examination, the only means that a defendant would have of discovering the existence of grounds upon which he could exercise a challenge for cause would be to investigate prospective jurors prior to the commencement of the trial. But such a possibility does not provide a realistic alternative to a voir dire examination. Not only would such an investigation be unlikely to disclose the biases and prejudices that a juror will only reveal when he is put on oath and examined by the court or counsel, but there would be no way to lay the foundation for the exercise of a challenge for such a cause without questioning the juror himself. The practical impossibility, moreover, for a criminal defendant, who may be indigent, to conduct an extensive investigation of a trial venire in the

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[15] See also *Morford v. United States*, 339 U.S. 258, 259 (1950); *Aldridge v. United States*, 283 U.S. 308 (1931); *Brown v. United States*, 119 U.S. App. D.C. 203, 338 F.2d 543 (D.C. 1964); *Bailey v. United States*, 53 F.2d 982, 984 (5th Cir. 1931); *People v. Boulware*, 29 N.Y.2d 135, 324 N.Y.S.2d 30 (1971).

limited time between its publication and the time of trial severely limits its usefulness.[16] Finally, any procedure which encouraged pretrial contact between a defendant and prospective jurors might itself impair their impartiality and be open to serious abuse.[17] It is for these reasons that a voir dire examination of prospective jurors in connection with the exercise of challenges for cause has been widely recognized as the principal, if not the only, means of selecting an impartial jury.[18] The practice is deeply rooted in the history of trial by jury,[19] and is the right of a criminal defendant in the fifty States, the District of Columbia and the federal courts.[20]

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[16]In the present case, the trial venire of 50 persons was not selected and summoned until ten days before the term of court at which petitioner was tried, in accordance with §38-61, S. C. CODE (1962) (A. 28). There is, moreover, no requirement that the defendant be provided with a list of the veniremen prior to the day of the trial. See *Stone v. United States*, 324 F.2d 804 (5th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958), *cert. denied*, 359 U.S. 196 (1959); cf. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial By Jury* §2.3 (Approved Draft 1968).

[17]See *Kiernan v. Van Schaik*, 347 F.2d 775, 780 (3rd Cir. 1965) ("The impartiality of jurors should be tested under the control of the court rather than by the unsupervised activities of investigators with all the undesirable possibilities of intimidation and jury tampering which such surveillance inevitably presents.")

[18]See Note, *supra* n. 5, 60 COLUM. L. REV. at 354; DEVLIN, *supra*, n. 5, at 31-33.

[19]Blackstone described the practice at common law as follows:

> "A juror may himself be examined on oath of *voir dire, veritatem dicere* (to speak the truth) with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage." 3 W. BLACKSTONE, COMMENTARIES 363 (Cooley ed. 1899).

[20]The right to conduct a voir dire examination is guaranteed specifically by statute in most states, and in other states by either court rules or decisional law. See ALA. CODE, tit. 15, §52 (1958); ALASKA STAT. §09.20.090 (1962); ARIZ. R. CRIM. P. 217 (1956);

By refusing to ask the questions proposed by petitioner, the trial judge effectively denied petitioner any opportunity to have the prospective jurors examined on voir dire with respect to whether they were prejudiced against him.

ARK. STAT. ANN. §39-226 (1962); CAL. PEN. CODE §1078 (West 1969); *Zancannelli v. People*, 63 Colo. 252, 165 Pac. 612 (1917); CONN. GEN. STAT. ANN. §51-240 (Cum. Supp. 1967); DEL. CODE §11-3301 (1953); DEL. SUPER. CT. (CRIM.) R. 24 (1948); D.C. CODE GEN. SESSIONS CT. R. 24 (1961); FLA. STAT. ANN. CRIM. PRO. R. §1.290 (1968); GA. CODE ANN. §59-806 (felony); *Nobles v. State*, 127 Ga. 212, 56 S.E. 125 (1906) (misdemeanor); (1965); HAWAII REV. STAT. §635-27 (1968); *State v. Hoagland*, 39 Idaho 405, 228 Pac. 314 (1924); ILL. REV. STAT. ch. 38, §115-4(f) (1965); *Epps v. State*, 102 Ind. 539, 1 N.E. 491 (1885); *State v. Dooley*, 89 Iowa 584, 57 N.W. 414 (1894); KAN. STAT. ANN. §22-3408(3) (Cum. Supp. 1971); KY. REV. STAT. R. CRIM. P. §9.38 (1970); LA. CONST. ART. I. §10; LA. STAT. ANN. CODE CRIM. P. § 786 (1967); ME. REV. STAT. ANN., tit. 15, § 1258 (1969); MD. ANN. CODE, Rule 745 (1971); MASS. ANN. LAWS, ch. 234, § 28 (1956); MICH. COMP. LAWS ANN. §768.8 (1948); *People v. Wheeler*, 96 Mich. 1, 55 N.W. 371 (1893); MINN. STAT. ANN. §631.26 (1945); MISS. CODE ANN. §1802 (1942); *State v. Mann*, 83 Mo. 589 (1884); MONT. REV. CODE, tit. 95 §1909 (c) (1947); NEB. REV. STAT. §29-2004 (1964); NEV. REV. STAT., tit. 14 §175.031 (1967); N. H. REV. STAT. ANN., ch. 500-A:32; 606:1, (Cum. Supp. 1971); N. J. STAT. ANN. tit. 2A §78-4 (1952); N. M. STAT. §21-1-1 (47a) (1953); N. Y. CRIM. PROC. L. §270.15 (McKinney's 1971); N. C. GEN. STAT. §9-15 (1969); N. D. CENT. CODE §29-17-28 (1960); OHIO REV. CODE §2945.27 (1971); *Roberson v. State*, 456 P.2d 595 (Okla. Crim. 1968); ORE. REV. STAT. §136.210 (1961); PA. STAT., tit. 19 §811 (1964); R.I. GEN. LAWS § 9-10-14 (1956); S. C. CODE OF LAWS § 38-202 (1962); *State v. Gurrington*, 11 S. D. 178, 76 N.W. 326 (1898); *Foute v. State*, 83 Tenn. 712 (1885); TEX. CODE CRIM. P. (Vernon's Ann.), Art. 35.17 (1965); *State v. Morgan*, 23 Utah 212, 64 Pac. 356 (1900); *State v. Mercier*, 98 Vt. 368, 127 Atl. 715 (1925); VA. CODE §§8-199, 19.1-206 (1960); *State v. Marfaudile*, 48 Wash. 117, 92 Pac. 939 (1907); *State v. Stonestreet*, 112 W. Va. 668, 116 S.E. 378 (1932); WIS. STAT. ANN. §§957.14, 270.16 (1947); WYO STAT. R. CRIM. P. 25 (1968). See ALI CODE OF CRIMINAL PROCEDURE, 109-110, 822 (Official Draft 1931); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury* 67 (Approved Draft 1968). FED. R. CRIM. P. 24 (a).

Clearly, the three general questions the judge put to the jurors relating to their impartiality were inadequate to elicit meaningful responses. It is widely recognized that the mere statement by the juror in response to a general query that he can be impartial is entitled to little weight. As one federal court concluded:

> "[M]erely going through the form of obtaining juror's assurances of impartiality is insufficient. . . . [W]hether a juror *can* render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness *without something more*" (Emphasis in original).[21]

Calling for purely subjective responses to general questions is ineffective to test impartiality, and "the defendant in a criminal case has the 'right to probe for the hidden prejudices of jurors'."[22]

A specific inquiry into prejudices of the jurors resulting from racial bias or pretrial publicity was particularly vital under the circumstances of the present case. As noted by the two dissenting Justices of the South Carolina Supreme Court, petitioner is a "black, bearded, civil or human rights activist" whose role as an SCLC worker had gained him notoriety in Florence County (A. 71, 73-74). The outcome of the prosecution against him for the possession of marijuana depended solely upon weighing the credibility of a white police officer who claimed that he had found the drug in petitioner's possession while searching him, and of petitioner who testified that he did not have the marijuana in his possession and that he was being "framed" by the authorities because of his involvement in civil rights. The case was, moreover,

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[21] *Silverthorne v. United States*, 400 F.2d 627, 638-39 (9th Cir. 1968); see also *United States v. Carter*, 440 F.2d 1132, 1134 (6th Cir. 1971).

[22] *Silverthorne v. United States, supra*, 400 F.2d at 640; see ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra*, n.6, at 130-134.

of unusual interest because of the recent concern and publicity in Florence over a serious "drug problem" (A. 36). Indeed, the police officer who was the State's chief witness had recently appeared on local television on a program devoted to violation of the drug abuse laws (A. 36). Petitioner's motions to quash the trial venire on the ground that blacks had been systematically excluded and for a change of venue or continuance on the ground of pretrial publicity, furthermore, alerted the trial judge to the possibility that prospective jurors might be prejudiced against him (A. 12, 15).

This Court has itself recognized that inquiries of the nature sought by petitioner are essential to the guarantee of an impartial trial. In *Swain v. Alabama*, 380 U.S. 202, 221 (1965), the Court noted that the influence of race on jurors is widely explored during voir dire and "that the fairness of trial by jury requires no less." And in *Aldridge v. United States*, 382 U.S. 308, 310 (1931), this Court reversed a conviction on the ground that the refusal of a federal trial judge to ask prospective jurors a question relative to racial prejudice in a case of a black defendant who was charged with shooting a white policeman violated "the essential demands of fairness." Federal courts have consistently held that a criminal defendant has a right to examine jurors specifically with respect to racial prejudice,[23] and such questions have been widely approved by state courts.[24]

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[23] *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971); *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *King v. United States*, 362 F.2d 968 (D.C. Cir. 1966); *Frasier v. United States*, 267 F.2d 62 (1st Cir. 1959); *Smith v. United States*, 262 F.2d 50 (4th Cir. 1959); *United States v. Dennis*, 183 F.2d 201, 227, n. 35 (2d Cir.), *aff'd* 341 U.S. 494 (1951).

[24] *Gholston v. State*, 221 Ala. 556, 130 So. 69 (1930); *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1956); *Pinder v. State*, 27 Fla. 370, 8 So. 837 (1891); *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934); *State v. Jones*, 175 La. 1014, 144 So. 899 (1932); *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Owens v. State*, 177 Miss. 488, 171 So. 345 (1930); *State v. Pyle*, 343 Mo. 876, 123 S.W.2d 166 (1938); *Johnson v. State*, 88 Neb. 565, 130 N.W. 282

The right to conduct an inquiry into whether the jurors have been prejudiced by pretrial publicity is implicit in the decisions of this Court. *Irvin v. Dowd, supra*; *Rideau v. Louisiana, supra*; *Sheppard v. Maxwell, supra*. Unless there had been such a voir dire examination in these cases, this Court would have been completely unable to assess the impact of the pretrial publicity on the impartiality of the jurors. And a defendant who has a right to a hearing to show that he is entitled to a change of venue because of pretrial publicity surely must also be entitled to show that a particular juror is not impartial for the same reason. *Groppi v. Wisconsin, supra*.[25]

In affirming petitioner's conviction, the South Carolina Supreme Court held that the trial judge did not abuse his discretion in refusing to examine the jurors as requested in view of the fact that petitioner "failed to carry the burden of showing that [the] questions should have been asked to assure a fair and impartial jury" (A. 102).[26] But the judge was fully aware of petitioner's race, the nature of the prosecution, the existence of pretrial publicity, and the proposed questions were reasonably designed to disclose the prejudices of jurors.[27] Under the circumstances, the limita-

(1911); *People v. Decker*, 157 N.Y. 186, 51 N.E. 1018 (1898); *State v. McAfee*, 64 N.C. 339 (1870); *Fendrick v. State*, 39 Tex. Cr. 147, 45 S.W. 589 (1898).

[25]See ABA PROJECT STANDARDS FOR CRIMINAL JUSTICE, *supra*, n. 6 at 130-135; *Silverthorne v. United States, supra; Marson v. United States*, 203 F.2d 904 (6th Cir. 1953).

[26]The court did not indicate what kind of a showing a defendant must make before being permitted to make inquiries with respect to race or pretrial publicity. Although it is clear under South Carolina law that in examining prospective jurors on voir dire it is within the discretion of the trial judge to go beyond the questions that are required by § 38-202 S. C. CODE (1962), *State v. Peterson*, 255 S. C. 579, 180 S.Ed.2d 341 (1871); *State v. Britt*, 237 S. C. 293, 117 S.Ed. 379 (1960), the cases do not establish any standards for the exercise of that discretion.

[27]See *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970). In this case, the Fourth Circuit rejected the argument that this Court's

tion of the voir dire examination by the court deprived petitioner of the only means by which he could enforce his constitutional right to challenge for cause jurors who were not impartial towards him. Although the extent of examination to which a defendant is entitled and the manner in which it is to be conducted, i.e., by court, counsel or both, must of necessarily be left largely to the discretion of the trial judge depending on the circumstances of the particular case,[28] petitioner submits that minimal constitutional standards for the effective exercise of his right to an impartial jury required the trial judge to have permitted him some opportunity to probe for prejudice resulting from racial bias or pretrial publicity.

CONCLUSION

For the foregoing reasons, petitioner's conviction violated his right to be tried by an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the United States

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decision in *Aldridge v. United States, supra,* should be limited to cases of interracial violence. The court held that the refusal to ask questions concerning racial bias could not be considered harmless error where, as in the present case, the defendant was black, the government's witnesses were white, and the outcome depended on weighing credibility. *Id.* at 1112.

[28] See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury*, §2.4 (Supp. 1968), giving the judge primary responsibility to conduct a voir dire examination but authorizing him to "permit such additional questions by the defendant or his attorney and the prosecuting attorney as he deems reasonable or proper."

Since counsel for petitioner did not seek to conduct the voir dire examination himself, this case raises no issue as to *who* should conduct the interrogation. Similarly, as the dissenting judges on the South Carolina Supreme Court recognized, the only question here is whether *any* inquiry into racial prejudice or the effect of pretrial publicity should be permitted, and not the extent of such inquiry.

Constitution. The judgment of the Supreme Court of South Carolina should be reversed and the case remanded for a new trial.

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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1971

No. 71-5139

GENE HAM, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF OF RESPONDENT

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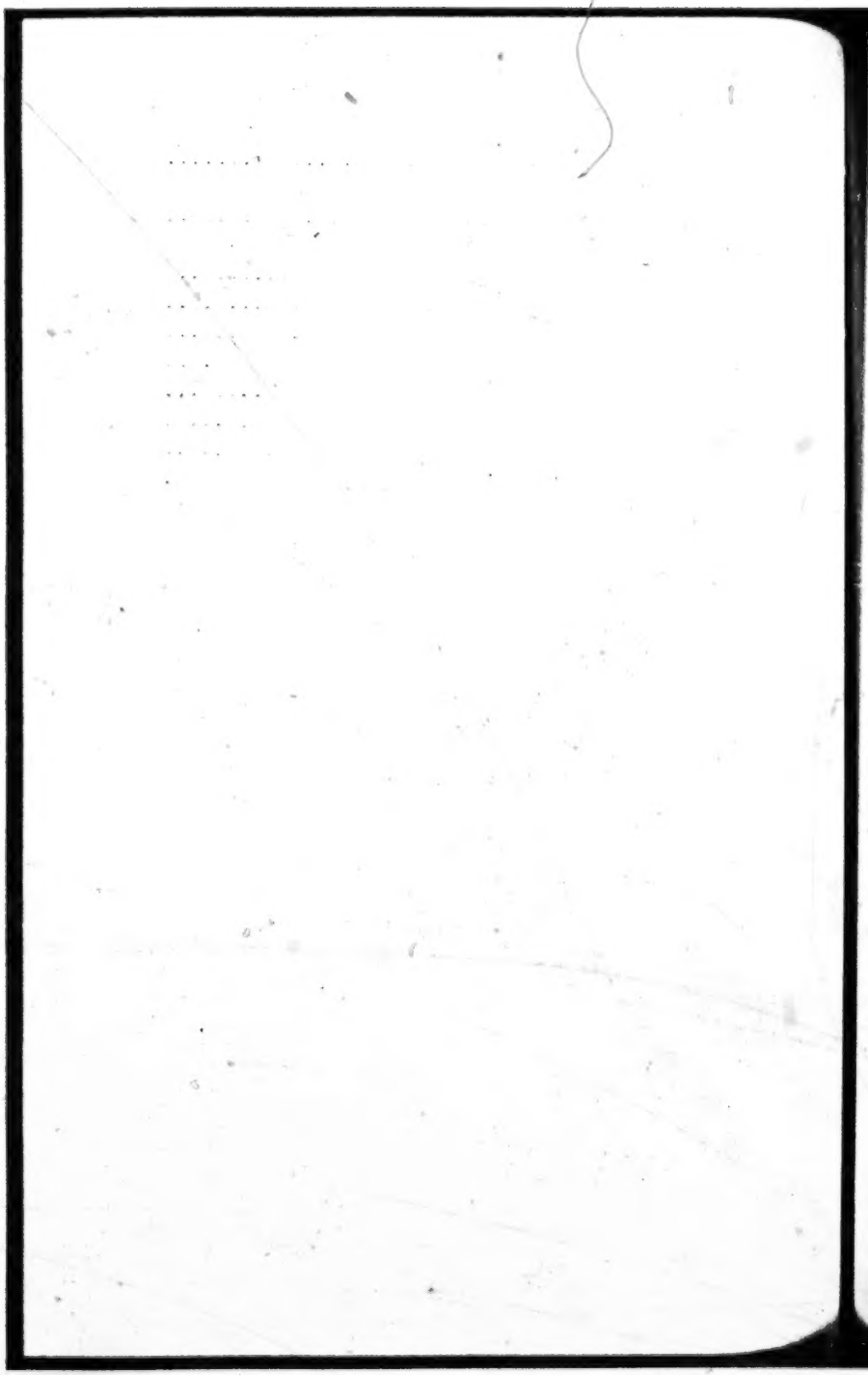

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5139

GENE HAM, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF OF RESPONDENT

ARGUMENT

The Trial Judge's Refusal to Examine the Jurors on Voir Dire as to Whether the Petitioner's Race or Pretrial Publicity Would Affect Their Ability to Render a Fair Verdict Was Not Violative of the Petitioner's Right to an Impartial Jury as Guaranteed by the Sixth and Fourteenth Amendments to the Constitution.

The guarantees of the Sixth Amendment as applied to the states through the Fourteenth provide that a criminal defendant shall have the right to a public trial by an impartial jury of the state and district wherein the crime

shall have been committed. This right of trial by jury cannot guarantee trial by a perfect jury, if such could exist, but only an impartial jury, one which favors neither party, is unprejudiced, disinterested, equitable, and just, and is composed of jurors who have not prejudged the merits of the case. *Shaver v. State,* 162 Tex. Crim. R. 15, 280 S. W. (2d) 740; *De La Rosa v. State,* Tex. Crim. App., 414 S. W. (2d) 668, 671; *People v. Straton,* 13 Mich. App. 350, 164 N. W. (2d) 555. The impartiality of jurors is insured by a selection process which involves no systematic and intentional exclusion of any group and an indiscriminate drawing therefrom. 47 *Am. Jur.* (2d) *Jury,* Section 164 at 758; *Hoyt v. Florida,* 368 U. S. 57 (1961); *Fay v. New York,* 332 U. S. 261 (1947). The State of South Carolina, while adhering to the above, provides a further method of insuring the impartiality of jurors through the provisions of Section 38-211, Code of Laws of South Carolina, 1962, which grants peremptory challenges in all criminal cases;* and challenges for cause available through the provisions of Article 1, Section 18 and Article 4, Section 22 of the South Carolina Constitution. The Trial Judge is charged by law to insure that each juror is qualified, unbiased, fair, and impartial. *State v. Rasor,* 168 S. C. 221, 167 S. E. 396, and questions as to a juror's fitness are directed to his discretion, *State v. Woods,* 189 S. C. 281, 1 S. E. (2d) 190, and the exercise of such discretion will not be disturbed on appeal in the absence of a showing of abuse thereof. *State v. Hyde,* 90 S. C. 296, 73 S. E. 180. The Trial Judge is further charged by law, Section 38-202, Code of Laws of South

* "Section 38-211 of the South Carolina Code of Laws for 1962 gives to the State five and to the defendant ten peremptory challenges. These may be used for any cause satisfactory to counsel or for no cause, and it is not the province of the Trial Judge or this Court to interfere." *State v. Richburg,* 250 S. C. 451, 158 S. E. (2d) 769. As is hereby shown, the statutory provisions guarantee varying numbers of peremptory challenges, according to the offense, and the exercise thereof is solely within the discretion of the challenging party.

Carolina, 1962, on motion of either party in the suit, to examine on oath any person, who is called as a juror therein, to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein. The party objecting to the juror may introduce competent evidence in support of his objection, and should the Court find the juror not indifferent to the cause, he shall be set aside.

In the instant case the Trial Judge refused to make the specific inquiries sought by defense counsel but made the more general inquiries as set forth in Section 38-202 (*supra*). There being no objection by the defense to any particular juror and no evidence being presented to establish bias or prejudice on the part of any juror (A., 35-48), it appears clear that the burden of establishing prejudice was not successfully born by the objecting party. This failure was sought to be excused on the grounds that the refusal of the Trial Judge to ask the proffered questions on *voir dire* prevented the defense from making a meaningful challenge for cause. Neither now nor then was there any showing that any juror was prejudiced against the defendant because of his race, and there was no showing whatsoever of prejudicial pretrial publicity. The only allegation of such publicity was made pursuant to a motion for a change of venue and continuance (A., 11-12), at which time the Trial Judge found the proffered exhibits not prejudicial as they did not refer to the defendant or the case (A., 12).

It is the contention of the State that the general statutory inquiries made by the Trial Judge sufficiently covered those specific inquiries sought by the defense. The defendant was in Court, within sight of the jury, when the statutory inquiries were made. It was obvious to the jury and all present that the defendant was black and bearded. The

redundancy of asking a prospective juror on his *voir dire*, "Are you conscious of any bias or prejudice for or against him?", "him" being the black, bearded defendant at whom the juror is looking; then to ask, "Are you conscious of any bias or prejudice against black people who wear beards?" would appear to be not only unnecessary but ridiculous.

If the argument of the petitioner is followed to its extreme, there is no proposed question on *voir dire* that could be excluded, as the possibility exists that every question, no matter how remote, could uncover some heretofore concealed bias of a prospective juror. It is for this reason that general questions on *voir dire* have been preferred. *Crawford v. United States,* 41 F. (2d) 979; *Commonwealth v. Lee,* 324 Mass. 714, 88 N. E. (2d) 713. If the general questions are framed in such a manner as to reveal if the defendant's race would prevent the prospective juror from giving the defendant or prosecution a fair and impartial trial, it should be deemed not only sufficient, but again preferred. *United States v. Gore,* 435 F. (2d) 1110; *Crawford v. United States (supra).*

General questions framed in a proper manner could avoid the dilemma in our court system early recognized in the case of *People v. Edwards,* 163 Cal. 752, 753, 127 Pac. 58, which stated:

> The records of the cases appealed to this Court, in which rulings made while impaneling a jury have been involved, indicate that there is an increasing tendency to prolong the proceedings inordinately by allowing counsel on either side to indulge in tedious examination of jurors, apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, and that the supposed privilege of doing so has been greatly abused.

The general questions posed in the instant case, as a factual matter, were sufficient and encomposed those specific inquiries sought by the defense. This contention is established by the fact that two jurors on the statutory *voir dire* indicated that they could not give the defendant a fair and impartial trial or that they did maintain bias or prejudice against him (A., 42, 47). To allege that the specific questions were necessary in addition to those presented is to ignore the facts, and to espouse tactics such as were denounced in *People v. Edwards (supra).*

The law clearly appears to be that the conduct of the *voir dire* examination is within the discretion of the Trial Judge, and the exercise of such discretion will not be disturbed in the absence of an abuse thereof. *Silverthorn v. United States,* 400 F. (2d) 627; *Connors v. United States,* 158 U. S. 408. Not only must the exercise of discretion be abused, the abuse must be of such a degree as to prejudice one of the parties for it to constitute reversible error. *State v. Higgs,* 143 Conn. 138, 120 A. (2d) 152; 47 *Am. Jur.* (2d) *Jury,* Section 177; *State v. Ferraro,* 146 Conn. 59, 147 A. (2d) 478. Again in the instant case, there is no showing of abuse and no showing of prejudice toward the defendant. There is no indication in the record that the defendant was tried other than on the facts, whereupon he was found guilty.

In some jurisdictions in order to establish prejudice, it is necessary that the defendant show that he was compelled to accept an objectionable juror. *Pendergrass v. State,* 121 Tex. Crim. 213, 48 S. W. (2d) 997. This State does not espouse this degree of showing of prejudice, but it is contended there must be some showing other than the mere fact of a guilty verdict. The guilty verdict in the instant case must relate to, and to some degree, be preconditioned upon the refusal of the Trial Judge to offer the proposed questions on *voir dire.* Absent some relation-

ship between the two, the assertion of prejudice is merely speculative and without merit. The instant case does not contain this relationship which is contended to be essential in order to constitute reversible error.

To require the Trial Judge to surrender his discretion and to demand specific questions on *voir dire* relating to the race of a criminal defendant, when general questions covering bias and prejudice have been asked, is to go beyond that requirement of an impartial jury as set forth in the Sixth Amendment and approach the undesirable result of a jury being tailored to fit a particular defendant.

The State agrees that some situations require the Trial Judge to go beyond the general statutory inquiries, but there must be some showing of need by the defense for him to do so. This Court and others have held on innumerable occasions that proposed questions on *voir dire* are properly refused absent a showing of their relationship to the pending case. *Yarborough v. United States,* 230 F. (2d) 56; *State v. Maxwell,* 151 Kan. 951, 102 P. (2d) 109; *State v. Huff,* 14 N. J. 240, 102 A. (2d) 8; *Connors v. United States (supra).* The instant case, involving a drug violation, had no racial overtones which would require specific questions of the nature proposed by the defense. There was no showing of any relation between the questions sought and the offense at hand, and absent such a showing, there was no abuse of discretion on the part of the Trial Judge in refusing such questions. This is particularly so when the general questions asked encompassed the specific ones sought. The right to trial by an impartial jury is just that, not a perfect jury nor one tailored to fit the case, and the defense failing to make a showing of partiality or any inference of such among the jurors fails to require a reversal of this case.

CONCLUSION

The State concludes that the Trial Judge's refusal to ask the specific questions on *voir dire* was well within the exercise of his discretion, as the general questions submitted to the prospective jurors encompassed the specific ones sought, and no showing of abuse nor resulting prejudice being made, the judgment of the Supreme Court of South Carolina should be upheld.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HAM *v.* SOUTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 71–5139. Argued December 6, 1972—Decided January 17, 1973

Petitioner, a civil rights worker, claims that the trial resulting in his drug conviction (which was affirmed by the South Carolina Supreme Court) was not fair because of the trial court's refusal to examine jurors on *voir dire* as to possible prejudice arising from the fact that petitioner is a Negro and that he wears a beard. *Held:* The trial court's refusal to make any inquiry of the jurors as to racial bias after petitioner's timely request therefor denied petitioner a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. Its refusal to inquire as to particular bias against beards, after it had make inquiries as to bias in general, was not constitutional error. Pp. 2–4.

256 S. C. 1, 180 S. E. 2d 628, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS and MARSHALL, JJ., filed opinions concurring in part and dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–5139

Gene Ham, Petitioner, v. State of South Carolina. | On Writ of Certiorari to the Supreme Court of South Carolina.

[January 17, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted in the South Carolina trial court of the possession of marihuana in violation of state law.[1] He was sentenced to 18 months' confinement, and on appeal his conviction was affirmed by a divided South Carolina Supreme Court. 256 S. C. 1 (1971). We granted certiorari limited to the question of whether the trial judge's refusal to examine jurors on *voir dire* as to possible prejudice against petitioner violated the latter's federal constitutional rights. 404 U. S. 1057 (1972).

Petitioner is a young, bearded Negro who has lived most of his life in Florence County, South Carolina. He appears to have been well known locally for his work in such civil rights activities as the Southern Christian Leadership Conference and the Bi-Racial Committee of the City of Florence. He has never previously been convicted of a crime. His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.

Prior to the trial judge's *voir dire* examination of prospective jurors, petitioner's counsel requested the

[1] S. C. Code § 32–1506 (1962).

judge to ask jurors four questions relating to possible prejudice against petitioner.[2] The first two questions sought to elicit any possible racial prejudice against Negroes; the third question related to possible prejudice against beards; and the fourth dealt with pretrial publicity relating to the drug problem. The trial judge, while putting to the prospective jurors three general questions as to bias, prejudice, or partiality that are specified in the South Carolina statutes,[3] declined to ask any of the four questions posed by petitioner.

The dissenting justices in the Supreme Court of South Carolina thought that this Court's decision in *Aldridge* v. *United States*, 283 U. S. 308 (1931), was binding on the State. There a Negro who was being tried for the murder of a white policeman requested that prospective jurors be asked whether they entertained any racial prejudice. This Court reversed the judgment of convic-

[2] The four questions sought to be asked are the following:

"1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?

"2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?

"3. Would you disregard the fact that this defendant wears a beard in deciding this case?

"4. Did you watch the television show about the local drug problem a few days ago when a local policeman appeared for a long time? Have you heard about that show? Have you read or heard about recent newspaper articles to the effect that the local drug problem is bad? Would you try this case solely on the basis of the evidence presented in this courtroom? Would you be influenced by the circumstances that the prosecution's witness, a police officer, has publicly spoken on TV about drugs?"

[3] S. C. Code § 38-202 (1962). The three questions asked of all prospective jurors in this case were, in substance, the following:

"1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

"2. Are you conscious of any bias or prejudice for or against him?

"3. Can you give the State and the defendant a fair and impartial trial?"

tion because of the trial judge's refusal to make such an inquiry. Chief Justice Hughes, writing for the Court, stated that the "essential demands of fairness" required the trial judge under the circumstances of that case to interrogate the veniremen with respect to racial prejudice upon the request of counsel for a Negro criminal defendant.

The Court's opinion relied upon a number of State court holdings throughout the country to the same effect, but it was not expressly grounded upon any constitutional requirement. Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these "essential demands of fairness," *e. g., Lisenba* v. *California,* 314 U. S. 219, 236 (1941), and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, *Slaughter-House Cases,* 83 U. S. (16 Wall.) 36, 81 (1872), we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias. Cf. *Groppi* v. *Wisconsin,* 400 U. S. 505, 508 (1971); *Bell* v. *Burson,* 402 U. S. 535, 541 (1971).

We agree with the dissenting justices in the Supreme Court of South Carolina that the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner.

The Court in *Aldridge* was at pains to point out, in a context where its authority within the federal system of courts allows a good deal closer supervision than does the Fourteenth Amendment, that the trial court "had a broad discretion as to the questions to be asked," 283 U. S., at 310. The discretion as to form and number of questions permitted by the Due Process Clause of the Fourteenth Amendment is at least as broad. In this context either of the brief, general questions urged by the petitioner would appear sufficient to focus the attention or prospective jurors to any racial prejudice they might entertain.

The third of petitioner's proposed questions was addressed to the fact that he wore a beard. While we cannot say that prejudice against people with beards might not have been harbored by one or more of the potential jurors in this case, this is the beginning and not the end of the inquiry as to whether the Fourteenth Amendment required the trial judge to interrogate the prospective jurors about such possible prejudice. Given the traditionally broad discretion accorded to the trial judge in conducting *voir dire*, *Aldridge* v. *United States*, *supra*, and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated when the trial judge refused to put this question. The inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied, and from a principal purpose as well as from the language of those who adopted the Fourteenth Amendment. The trial judge's refusal to inquire as to particular bias against beards, after his inquiries as to bias in general, does not reach the level of a constitutional violation.

Petitioner's final question related to allegedly prejudicial pretrial publicity. But the record before us contains neither the newspaper articles nor any description of the television program in question. Because of this lack of material in the record substantiating any pretrial publicity prejudical to this petitioner, we have no occasion to determine the merits of his request to have this question posed on *voir dire*.[4]

Because of the trial court's refusal to make any inquiry as to racial bias of the prospective jurors after petitioner's timely request therefor, the judgment of the Supreme Court of South Carolina is

Reversed.

[4] The record indicates that there was a brief colloquy between petitioner's counsel and the trial judge, in which the former apparently offered newspaper accounts and an editorial in support of his request that the question be propounded; the judge responded that he did not consider the items submitted prejudicial. The Supreme Court of South Carolina, discussing prejudicial publicity in the context of petitioner's claim that he was entitled to a change of venue, stated that "the two newspaper clippings and one editorial concerning drug abuse did not name the defendant or refer in any way to his trial."

SUPREME COURT OF THE UNITED STATES

No. 71-5139

Gene Ham, Petitioner, *v.* State of South Carolina. | On Writ of Certiorari to the Supreme Court of South Carolina.

[January 17, 1973]

MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

I, too, concur in that portion of the majority's opinion which holds that the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice on *voir dire*. I think, however, that it was an abuse of discretion for the trial judge to preclude the defendant from an inquiry by which prospective jurors' prejudice to hair growth could have been explored.

It is unquestioned that a defendant has the constitutional right to a trial by a neutral and impartial jury. Criminal convictions have been reversed when the limitations on *voir dire* have unreasonably infringed the exercise of this right. *Aldridge* v. *United States*, 283 U. S. 308. Such reversals have not been limited to incidents where the defendant was precluded from inquiring into possible racial prejudice. In both *Burford* v. *United States*, 339 U. S. 258, and *Dennis* v. *United States*, 339 U. S. 162, defendants were held to have the right to inquire into possible prejudices concerning the defendants' alleged ties with the Communist party. In *Aldridge* v. *United States*, 283 U. S. 308, 313, this Court made it clear that *voir dire* aimed at disclosing "prejudices of a serious character" must be allowed.

Prejudice to hair growth is unquestionably of a "serious character." Nothing is more indicative of the importance currently being attached to hair growth by the

general populace than the barrage of cases reaching the courts evidencing the attempt by one segment of society officially to control the plumage of another. On the issue of a student's right to wear "long-hair" alone there are well over 50 reported cases (*Olff* v. *East Side Union High School*, — U. S. —). In addition the issue of plumage has surfaced in the employment-discrimination context (*Roberts* v. *General Mills Inc.*, 337 F. Supp. 1055; *Concord* v. *Goolsby*, — F. Supp. — (5 FEP 156) as well as the military area (*Friedman* v. *Froehlke*, — F. Supp. — (5 SSLR 3179).

The prejudices invoked by the mere sight of "non-conventional" hair growth are deeply felt. Hair growth is symbolic to many of rebellion against traditional society and disapproval of the way the current power structure handles social problems. Taken as an affirmative declaration of an individual's commitment to a change in social values, "non-conventional" hair growth may become a very real personal threat to those who support the *status quo*. For those people, "non-conventional" hair growth symbolizes an undesirable lifestyle characterized by unreliability, dishonesty, lack of moral values, communial ("communist") tendencies, and the assumption of drug use. If the defendant, especially one being prosecuted for the illegal use of drugs, is not allowed even to make the most minimal inquiry to expose such prejudices, can it be expected that he will receive a fair trial?

Since hair growth is an outward manifestation by which many people determine whether to apply deep-rooted prejudices to an individual, to deny a defendant the right to examine this aspect of a prospective jurors personality is to deny him his most effective means of *voir dire* examination.

SUPREME COURT OF THE UNITED STATES

No. 71–5139

Gene Ham, Petitioner, *v.* State of South Carolina.	On Writ of Certiorari to the Supreme Court of South Carolina.

[January 17, 1973]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I concur in that portion of the majority's opinion which holds that the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice on *voir dire*. I also agree that on this record, we cannot say that the judge was required to ask questions about pretrial publicity. I cannot agree, however, that the judge acted properly in totally foreclosing other reasonable and relevant avenues of inquiry as to possible prejudice.

Long before the Sixth Amendment was made applicable to the States through the Due Process Clause of the Fourteenth Amendment, see *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), this Court held that the right to an "impartial" jury was basic to our system of justice.

> "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process . . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199. This is true, regardless of the heinousness

> of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds* v. *United States*, 98 U. S. 145, 155." *Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961) (footnote omitted).

See also *Turner* v. *Louisiana*, 379 U. S. 466, 471–473 (1965); *Glasser* v. *United States*, 315 U. S. 60, 84–86 (1942).

We have never suggested that this right to impartiality and fairness protects against only certain classes of prejudice or extends to only certain groups in the population. It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict. It is unsurprising, then, that this Court has invalidated decisions reached by juries with a wide variety of different prejudices. See, *e. g.*, *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968); *Irvin* v. *Dowd*, 366 U. S. 717 (1961); *Morford* v. *United States*, 339 U. S. 258 (1950).

Moreover, the Court has also held that the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial. A variety of techniques are available to serve this end, see *Groppi* v. *Wisconsin*, 400 U. S. 505, 509–511 (1971); *Sheppard* v. *Maxwell*, 384 U. S. 333, 357–363 (1966), but perhaps the most important of these is the jury challenge. See, *e. g.*, *Johnson* v. *Louisiana*, 406 U. S. 356, 379 (1972) (opinion of MR. JUSTICE POWELL); *Swain* v. *Alabama*, 380 U. S. 202, 209–222 (1965). Indeed, the first Mr. Justice Harlan, speaking

for a unanimous Court, thought that the right to challenge was "one of the most important of the rights secured to the accused" and that "[a]ny system for the empanelling of a jury that presents [*sic*] or embarrasses the full, unrestricted, exercise by the accused of that right, must be condemned." *Pointer* v. *United States*, 151 U. S. 396, 469 (1894). See also *Lewis* v. *United States*, 146 U. S. 370, 376 (1892).

Of course, the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on *voir dire* upon which the challenge for cause can be predicated. See *Swain* v. *Alabama*, 380 U. S. 202, 221 (1965). It is for this reason that the Court has held that "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury," *Dennis* v. *United States*, 339 U. S. 162, 171–172 (1950), and that the Court has reversed criminal convictions when the right to query on *voir dire* has been unreasonably infringed. See, *e. g.*, *Aldridge* v. *United States*, 283 U. S. 308 (1931). Contrary to the majority's suggestion, these reversals have not been confined to cases where the defendant was prevented from asking about racial prejudice. See, *e. g.*, *Morford* v. *United States*, 339 U. S. 258 (1950). Cf. *Dennis* v. *United States*, *supra*.[1]

I do not mean to suggest that a defendant must be permitted to propound any question or that limitless time must be devoted to preliminary *voir dire*. Although the defendant's interest in a jury free of prejudice is strong, there are countervailing state interests in the

[1] Indeed, it was not so confined in *Aldridge* itself, upon which the majority heavily relies. *Aldridge* pointed out that "[t]he right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." 283 U. S., at 313.

expeditious conduct of criminal trials and the avoidance of jury intimidation. These interests bulk larger as the possibility of uncovering prejudice becomes more attenuated. The trial judge has broad discretion to refuse to ask questions which are irrelevant or vexatious.[2] Thus, where the claimed prejudice is of a novel character, the judge might require a preliminary showing of relevance or of possible prejudice before allowing the questions.

But broad as the judge's discretion is in these matters, I think it clear that it was abused in this case. The defense attorney wished to ask no more than four questions which would have required a scant 15 additional minutes of the court's time. The inquiries, directed *inter alia* to possible prejudice against people with beards, were obviously relevant, since the defendant was in fact bearded. Moreover, the judge afforded petitioner no opportunity to show that there were a significant number of potential jurors who might be prejudiced against people with beards. At minimum, I think such an opportunity should have been provided. I cannot believe that in these circumstances an absolute ban on questions designed to uncover such prejudice represents a proper balance between the competing demands of fairness and expedition.

It may be that permitting slightly more extensive *voir dire* examination will put an additional burden on the administration of justice. But as Chief Justice Hughes argued 40 years ago "it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to sit as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring

[2] I also agree with the majority that the judge may properly decline to ask the question in any particular form or ask any particular number of questions on a subject.

the processes of justice into disrepute." *Aldridge* v. *United States*, 283 U. S. 308, 315 (1931).

I would therefore hold that the defendant in this case, and subject to the limitations set out above, had a constitutionally protected interest in having the judge propound the additional question, in some form, to the jury.